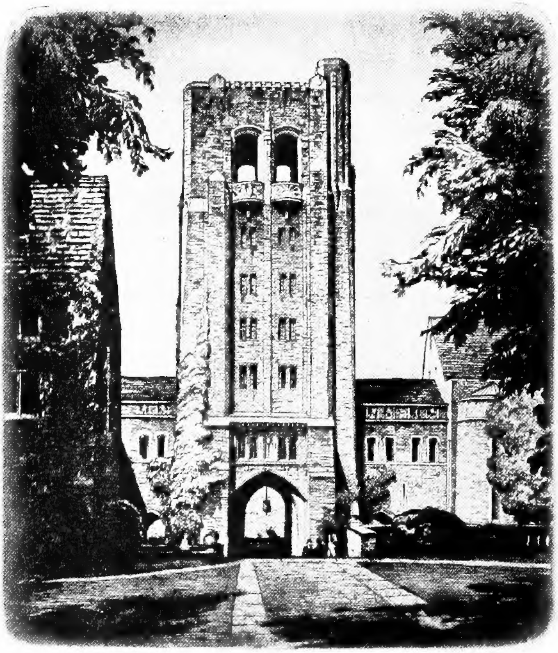

A

TREATISE

ON THE

LAW OF PARTNERSHIP.

BY

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FOURTH EDITION, REVISED AND ENLARGED,

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PREFACE

TO THE LAW OF PARTNERSHIP.

I HAVE followed the same plan in this as in my former works, judging from the favor they meet with and all I can learn about them that it is satisfactory to the profession.

It may be briefly described thus: In the text, I state the law as clearly and succinctly as I can, enlarging upon the reasons and principles involved when I treat of questions more than usually important, difficult, or uncertain. In the notes, I give all that the complete library of this Law School could supply me with, of authorities needed to verify the law as stated, or exhibit the qualifications or modifications to which it is subject, and enable an inquirer, with a library at command, to make a thorough investigation of any question. The great and still growing increase in the number of reports makes it very difficult for any individual to have a full collection of them; and leads me to believe that a work intended, on the one hand, to supply on its specific subjects the want of a library so far as any single work can hope to do this, and, on the other, to facilitate the use of a complete library for those who have access to one, will be found useful to students and practitioners.

This work has been long in hand, and would have been published some years ago, had I not thought, with my publishers, that it was better to wait for peace. I shall not regret this delay, if it has enabled me, by additional labor and the use of recent authorities, to offer it in a less defective condition to the profession, whose kind reception of my other works gives me so much cause for gratitude.

T. P.

CAMBRIDGE, 1867.

PREFACE

TO THE FOURTH EDITION.

In preparing a fourth edition of this work, two things have been kept in mind: first, to bring the work down to date not only in the citation of authorities, but also in the statement of principles; second, to keep the work within the limits of a single easily-handled volume. In collecting new authorities the editor has attempted to give as many as possible of the English and American cases decided since the publication of the last edition, and to add such earlier authorities as would establish or illustrate the statements of principle added in this edition. Some such statements, which seemed necessary to a complete presentation of the subject, have been inserted in the text or added in the form of notes. The recent development in importance of new forms of business combination seemed to call for a brief statement of the principles governing such combinations, and a chapter has accordingly been added upon that subject.

The important change in the conception of a partnership held by many legal minds, which was caused by the decision of the House of Lords in the case of Cox *v.* Hickman, — a change, the full significance of which is even yet scarcely apprehended, — made it necessary to rewrite the first and fifth chapters of this work. Much of the discussion in them was rendered unnecessary, and has been omitted; and the mercantile conception of a partner-

ship, which seems in consequence of that decision to have become the legal conception also, has been carefully explained. A comparison with the earlier editions will show with what sagacious legal insight the author himself arrived at what we must think very nearly the true conception of a partnership at a time when it had little recognition from bench or bar. Great acknowledgment is due to Prof. J. B. Ames, to whom more than to any one in this country we owe the acceptance of the doctrine.

With a view to prevent an increase of bulk, all that seemed unnecessary or obsolete in the last edition, both in the text and in the notes, has been omitted. Nothing pertinent to the subject, however, has been stricken out unless it was a restatement of matter found elsewhere in the work. Many notes have been materially shortened by compressing statements of cases contained in them.

That the book might be more conveniently consulted, it has been divided into sections, and it has therefore been necessary to abandon the original paging. The index has been entirely rewritten and much enlarged, and no difficulty, it is hoped, will be experienced in finding a reference to an earlier edition. An appendix of Forms of Articles of Copartnership has been annexed, as useful to the practitioner.

All matter added to the text and to the author's notes has been enclosed in brackets. The editor's notes are distinguished by being numbered.

J. H. BEALE, JR.

CAMBRIDGE, September 1, 1893.

CONTENTS.

CHAPTER XVI.

CHAPTER XVII.

CHAPTER XVIII.

CHAPTER XIX.

TABLE OF CASES.

References are to pages.

A.

B.

F.

G.

H.

I.

K.

L.

M.

N.

O.

P.

Q.

R.

S.

T.

U.

V.

W.

Y.

Z.

A TREATISE

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THE LAW OF PARTNERSHIP.

CHAPTER I.

DEFINITION AND NATURE OF A PARTNERSHIP.

§ 1. **Definition of Partnership.** — Partnership is a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them.[1]

The word "firm" is often used synonymously with "partnership," though it might better be restricted to its original meaning, the partners or members of the partnership taken collectively. As, however, the distinction is not made by the courts it is perhaps useless to insist upon it; and the two words will in the following pages be used synonymously.[2]

§ 2. **Origin of Law of Partnership.** — The law of partnership, as it exists in England and in this country, constitutes a system by itself. Its origin cannot be found, excepting in the law merchant, which is itself only the custom of merchants, adopted, systematized, and enforced by the courts. (*a*)

(*a*) Thus the peculiar doctrines of the law of partnership, which most distinguish it from the common law, as that there is no survivorship of property or rights between partners (except for the settlement of the business), that the act of one partner, in reference to a partnership matter, is the act of all, are declared by the earliest authorities to be "*per legem mercatoriam,*" and "*pro beneficio com-*

[1] This is the definition of the Civil Code of New York, with the addition of the words "a legal entity formed by." It was criticised by Jessel, M. R., in Pooley *v.* Driver, 5 Ch. D. 458, on the ground that it allows the formation of a partnership for an illegal purpose. But an association for an illegal business would evidently be a partnership, though an illegal one. See post, § 8, *note.* A collection of the definitions which have been proposed for a partnership may be found in 1 Lindl. Part. p. 1.

[2] There can be no firm without at least two partners. Therefore in a State where an action is allowed to be brought against a partnership in the firm name the action altogether fails if the business, though carried on under the name of A. & Co., is owned by A. alone. Stirling *v.* Heintzman, 42 Mich. 449, 4 N. W. 165.

Commercial partnerships were known to the Romans; and their law recognized and regulated them. So far as commerce was then conducted in a similar manner and upon similar principles as at present, the rules of the Roman law are applicable now; for that law, quite as much as our own, applied to the transactions of merchants a law founded upon their usages; and to this extent we may regard the Roman civil law of partnership as similar to our own. As a very large part of commercial business consists in forming and executing contracts which must be governed by the law of contracts generally, and this is a part of the common law, many of the principles applicable to partnership are the same as those which regulate the common transactions of men; and so far the law of partnership may be said to be founded upon the common law. We doubt, however, whether anything is gained by references of this kind. The supposed analogies between the law of partnership and other branches of the law, if they sometimes afford ample illustration, lead to confusion and error when we attempt to carry them far; or, by their help, deduce from other departments of the law a rule which may control and determine a question of partnership.

§ 3. **Mercantile Idea of Partnership.** — That a partnership is an entity, distinct from the partners, is the view of the business world everywhere. Merchants and accountants alike look upon a firm as a body which has independent rights, as well against its members as against strangers. Accountants credit the partners with advances on the books of the firm, and debit them with overdrafts, the accounts being kept between each partner individually and the firm, not between the partners.

Since the law of partnership is founded upon the law merchant, that is, the custom of merchants, we should expect to find the mercantile conception of a partnership recognized by the law. And such is the state of the law in those European countries where the civil law is in force, as for instance in Scotland,[1] and in Louisiana, where the Code is founded on the civil law.[2] We

mercii." Jenkins, 160; Co. Litt. 182 a; 2 Brown, 99; Jeffreys *v.* Small, 1 Vernon, 217; Leake *v.* Craddock, 3 P. Wms. 158; Vanheath *v.* Turner, Winch. 24; Molloy, b. 2, ch. 10, § 19. The case of Pinckney *v.* Hall is thus reported in 1 Salk. 126: "*By the custom of England,* where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect." —— *v.* Layfield, 1 Salk. 292. See also 2 Rol. Abr. 702, 370; Anon., Styles, 370 A.

1 Bell, Principles, § 357.

2 Succession of Pilcher, 39 La Ann. 362, 1 So. 929; Liverpool, B. & R. P. Nav. Co. *v.* Agar, 14 F. R. 615, 4 Woods, 201.

have seen that the civil law of partnership was founded, equally with our own, upon the custom of merchants, and there should therefore be no difference in this respect between the rules of the civil law and those of our own.

§ 4. **How far recognized by Law.** — In our law, however, the partnership has not been clearly recognized as an entity. In an action at law, at least, the partners alone are recognized as parties in interest, as owners of the firm property, and as principals in the firm business. Yet even at law certain doctrines are held which can be consistently explained only by recognizing the firm as an entity. The courts of equity show more recognition of the true character of a partnership; but even in equity this has not been made clear until recently. There is now, however, a strong disposition on the part of the courts to recognize the mercantile doctrine.

Perhaps the earliest statement of the doctrine was by Hornblower, C. J., in Curtis *v.* Hollingshead.[1] "The firm is the *contracting* party, not the individuals composing the firm; the credit is given to the *firm;* the partnership, the ideal person, formed by the union of interest, is the legal debtor. A partnership is considered in law as an artificial *person*, or *being*, distinct from the individuals composing it."

The doctrine was well stated by Jessel, M. R., in Pooley *v.* Driver.[2] "Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm." [3]

[1] 2 Green (N. J.) Law 403, 410 (1834). See Faulkner *v.* Whitaker, 3 Green Law 438, 439.

[2] 5 Ch. D. 458, 476.

[3] Language as clear as this has been used to describe a firm by some of the ablest judges in this country. "When one joins a partnership he makes himself a part of an entity already existing, which has acquired certain property and business, and in acquiring it has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts." Brewer, J., in Cross *v.* Burlington Nat. Bank, 17 Kas. 336, 340.

"The partnership for most legal purposes is a distinct entity, — having its own property, capable of contracting separate debts, having the right to sue in equity its several members, and to be protected against their conduct to the same extent that it might be against the conduct of strangers." Cooley, J., in Robertson *v.* Corsett, 39 Mich. 777, 784.

§ 5. **Relation between Partners and Partnership.** — The relation between the partners and the firm is that of agent to principal; and the firm property, the legal title to which is held by the partners, is in trust for the firm. Each partner, in doing an act which is within the scope of his agency, is acting therefore for the firm. It is ordinarily said that the partners are agents for each other; each partner when carrying on business being principal as to his own interest and agent as to the interests of his partners. A more exact conception of the transaction is however that already indicated: that each partner acts not as principal on his own account and also, in the same transaction, as agent for his copartners; but that he acts in the single capacity of agent for the partnership, and neither for himself nor for his copartners.

"A partnership, or joint stock company, is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation; and can contract as an individualized and unified party, with an individual person who is a member thereof, as effectually as a corporation can contract with one of its stockholders. The obligation and the liability, *inter partes*, are the same in the one case as the other. The only practical difference is a *technical* one, having reference to the *forum* and form of remedy." Barrett, J., in Walker *v.* Wait, 50 Vt. 668, 676. See also Forsyth *v.* Woods, 11 Wall. 484; Goldsmith *v.* Eichold, 94 Ala. 116, 10 So. 80; *In re* Dennery, 89 Cal. 101, 26 Pac. 639; Bracken *v.* Dillon, 64 Ga. 243, 251; Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40; Henry *v.* Anderson, 77 Ind. 361; Paige *v.* Paige, 71 Ia. 318, 32 N. W. 360; Roop *v.* Herron, 15 Neb. 73, 80; Whitman *v.* Keith, 18 Oh. St. 134, 144; Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83. In some of these cases a statute provided that the partnership might sue and be sued by its name. This statute, however, since it applied only to the remedy, could not change the nature of a partnership. If, as is everywhere decided, it is an entity in the eye of the law after such a statute, it must really have been so before the passage of the statute.

CHAPTER II.

HOW PARTNERSHIP MAY BE MADE.

§ 6. **Partnership by Express Contract.** — There must be a lawful and valid agreement to enter into partnership; and this contract must be executed. And therefore courts do not declare persons to be partners under an agreement of partnership, without proof that some joint transactions have been undertaken in accordance with it, or some joint benefit received. (*a*) But a partnership may be made by an agent; and, if by one not then an agent, a subsequent ratification makes the partnership effectual. (*aa*) Not unfrequently in England, and more rarely here, the contract is sealed; but this can seldom be useful, and is never necessary to its validity. Usually the contract is in writing; and should always be so, as a matter of reasonable precaution. But writing

(*a*) Metcalf *v.* Royal Exch. Ass. Co., Barnard. 343; Heyhoe *v.* Barge, 9 C. B. 431; West Point Foundry Association *v.* Brown, 3 Edw. Ch. 284; Atkins *v.* Hunt, 14 N. H. 205; Goddard *v.* Pratt, 16 Pick. 412. If two or more persons, who agree to enter into partnership, stipulate each to furnish a certain amount of capital, compliance with this stipulation *may be* a condition precedent, without the fulfilment of which no partnership will exist, unless it be waived by the consent of both parties. McGraw *v.* Pulling, 1 Freem. Ch. 357; Bird *v.* Hamilton, Walker Ch. 361. Where E. advanced money to W., to enable him to perfect and realize a certain invention, and W., besides expressly promising to repay the advance, agreed that, if the invention should be one of public or private use, W. should have one-third of the profits thereof; it was held that E. might sue W. for the sum so advanced. Elgie *v.* Webster, 5 M. & W. 518. So in Burnell *v.* Hunt, 5 Jur. 650, where B. was to receive from A., for superintending the latter's manufactory, half the profits as soon as any accrued, and, till that time, 2*l.* per week. No profits having ever arisen, the court held that there could be no partnership before that time. If a man make an agreement for a partnership, but expressly reserve for himself for twelve months the option of determining finally whether or not he will be a partner, he is not one until he exercises that option and declares himself such. Gabriel *v.* Evill, 9 M. & W. 297. See Chapman *v.* Wilson, 1 Rob. (Va.) 267; President, Directors, & Co. of the Adams Bank *v.* Rice, 2 Allen, 480; Andrews *v.* Garstin, 10 C. B. N. S. 444; Lascaridi *v.* Gurney, 11 C. B. N. S. 890; Moody *v.* Rathburn, 7 Minn. 89; Cook *v.* Carpenter, 34 Vt. 121. Where one permits another to buy stock on their joint account, in anticipation of forming a partnership, and immediately afterwards repudiates the agreement to become a partner, he is not entitled to any of the property bought, nor are his individual creditors. Rice *v.* Shuman, 43 Pa. 37. See, as to what connection in business constitutes a partnership, and the admission of new members, Meaher *v.* Cox, 37 Ala. 201.

(*aa*) Williams *v.* Butler, 35 Ill. 544.

is not essential to render the general agreement, or any of its details, valid. (*b*) And though articles exist, the partnership may be proved by parol, if the question is between those who form the firm, and a stranger. (*bb*)

Whether a partnership exists is a question of fact; what a partnership is, is a question of law. (*c*) Sometimes the question occurs, whether the provisions of a partnership come within the requirement of the Statute of Frauds, and must therefore be in writing. [According to the weight of authority, a partnership, even if formed for the purpose of dealing in land, may be created by a verbal agreement: though according to some authorities it must be in writing.] (*d*)

(*b*) The true meaning and application of this rule is clearly stated by Tindal, C. J., in Fox *v.* Clifton, 9 Bing. 117. See also Smith *v.* Tarlton, 2 Barb. Ch. 336.

(*bb*) Anderson *v.* Clay, 1 Stark. 405; Griffin *v.* Doe, 12 Ala. 783; Widdifield *v.* Widdifield, 2 Binn. 245; Bonnaffe *v.* Fenner, 6 Sm. & M. 212; Allen *v.* Rostain, 11 S. & R. 362. Otherwise, perhaps, where the question of partnership or no partnership arises between the partners themselves. Cutler *v.* Thomas, 25 Vt. 73. See Buffum *v.* Buffum, 49 Me. 108, and Villa *v.* Jonte, 17 La. Ann. 9.

(*c*) Gabriel *v.* Evill, Car. & M. 358; Drake *v.* Elwyn, 1 Caines, 184; Beecham *v.* Dodd, 3 Harr. (Del.) 485; Doggett *v.* Jordan, 2 Fla. 541; Everett *v.* Chapman, 6 Conn. 347; Terrell *v.* Richards, 1 N. & McC. 20. See Dwinell *v.* Stone, 30 Me. 384.

(*d*) In Smith *v.* Burnham, 3 Sumn. 435, the plaintiff brought his bill in equity, alleging an agreement of copartnership between himself and the defendant for general business purposes, and, among others, for the purchase and sale of lands, and praying for a general account of the affairs of the partnership. The existence of the partnership was attempted to be proved only by parol. Story, J., held that a verbal agreement to become interested as partners in the purchase and sale of lands was a parol contract respecting an interest in lands within the Statute of Frauds, and therefore void. So in Vice *v.* Anson, 7 B. & C. 409; Henderson *v.* Hudson, 1 Munf. 510. Lefevre's Appeal, 69 Pa. 123; Ebbart's Appeal, 70 Pa. 79. [Young *v.* Wheeler, 34 F. R. 98; Larkins *v.* Rhodes, 5 Port. 195; Everhart's Appeal, 106 Pa. 349; Raub *v.* Smith, 61 Mich. 543, 28 N. W. 676. In Louisiana a written contract of partnership is required by the code: Pecot *v.* Armelin, 21 La. Ann. 667.] But in Dale *v.* Hamilton, 5 Hare, 369, a different view prevailed. In that case, the bill of the plaintiff, a land agent and surveyor, alleged a parol agreement of copartnership with the defendants, who were capitalists, for the sole purpose of speculation in lands; and that, by the terms of their agreement, each of the parties was to be interested one-third in profits and losses. Real estate had confessedly been acquired under some arrangement of this sort, which had since greatly risen in value. The prayer of the plaintiff was, that the affairs of the joint concern might be wound up, the lands sold for the most they would fetch, and the proceeds distributed by the court in accordance with the terms of the said contract. The Vice-Chancellor (after a statement of the question raised) said: "When the proposition was first advanced by the plaintiff, I confess, it appeared to me, that to admit the argument to the extent contended for would be virtually to repeal the Statute of Frauds, or nearly so." But, upon examination of the authorities, he felt himself bound to hold that the plaintiff might first prove by parol the existence of the partnership, as an independent fact, and, that being established, might then show by the same evidence his interest in the lands, considered as the substratum or stock of the partnership. An issue was

It becomes more important, and indeed necessary, that the contract should be reduced to writing, in proportion as it is composed of many articles, and provides in detail for the transaction of the business of the firm, or for the rights and duties of the partners. Of the effect and construction of written articles we shall speak particularly hereafter. (*e*)

§ 7. **Partnership without Express Agreement.** — Partnership may be formed not only by express agreement, but may grow out of transactions or relations in which the word "partnership" is not uttered. If there is such a joinder of interests and action as the law considers as the equivalent of partnership, or rather, such as it regards as constituting partnership, it will give to the persons

accordingly directed to determine whether such an agreement of copartnership as that alleged in the bill had been made. See Caddeck *v.* Simpson, 2 De G. & J. 52; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Haupf *v.* Howard, 3 Jones Eq. 440, 445. The result of the cases, as well as of true reasoning upon the question, would seem to be that of the Vice-Chancellor in Dale *v.* Hamilton, *supra.* *In re* Warren, Davies, 320; York *v.* Clemens, 41 Ia. 95; Scruggs *v.* Russell, McCah. (Kas.) 39; Julio *v.* Ingalls, 1 All. 41; Sherwood *v.* R. R. Co., 21 Minn. 127; Chester *v.* Dickerson, 54 N. Y. 1; Smith *v.* Tarlton, 2 Barb. Ch. 336; Storer *v.* Flack, 41 Barb. 161; Jones *v.* McMichael, 12 Rich. L. 176. [*In re* Ransom, 17 F. R. 331; McElroy *v.* Swope, 47 F. R. 380; Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359; Meagher *v.* Reed, 14 Col. 335, 24 Pac. 681; Bunnel *v.* Taintor, 4 Conn. 568; Holmes *v.* McCray, 51 Ind. 358; Richards *v.* Grinnell, 63 Ia. 44, 18 N. W. 668; Pennybacker *v.* Leary, 65 Ia. 220, 21 N. W. 575; Collins *v.* Decker, 70 Me. 23; Somerby *v.* Buntin, 118 Mass. 279; Newell *v.* Cochran, 41 Minn. 374, 43 N. W. 84; Hirbour *v.* Reeding, 3 Mont. 13; Personette *v.* Pryme, 34 N. J. Eq. 26; Flower *v.* Barnekoff, 20 Ore. 132, 25 Pac. 370; Case *v.* Seger, 4 Wash. St. 492, 30 Pac. 646. See also Allison *v.* Perry, 130 Ill. 9, 22 N. E. 492; Marsh *v.* Davis, 33 Kas. 326, 6 Pac. 612; Carr *v.* Leavitt, 54 Mich. 540. In Wisconsin it is held that where a partnership is formed for another purpose, and the partners agree verbally to buy land and take the title in the name of one partner, the other is prevented by the Statute of Frauds from claiming any interest in the land. Bird *v.* Morrison, 12 Wis. 138; Clarke *v.* McAuliffe, 81 Wis. 104, 51 N. W. Rep. 83.

It has been held that a contract of partnership to continue more than a year is within that provision of the Statute of Frauds which requires contracts not to be performed within a year to be in writing. Morris *v.* Peckham, 51 Conn. 128; Jones *v.* McMichael, 12 Rich. 176. Such a contract, though not in writing, has, however, elsewhere been held valid. McKay *v.* Rutherford, 6 Moo. P. C. 413, 13 Jur. 21; Smith *v.* Tarlton, 2 Barb. Ch. 336; Jordan *v.* Miller, 75 Va. 442.

There can be no doubt that the prevailing view is the better one. The contract is executed when the partnership relation is entered into. All that is done after that is done by and for the partnership. If land is purchased it is the land of the partnership, and not of the individual partners. In short, the only action that could be brought for breach of the contract would be an action for failure to launch the partnership: any cause of action arising after the partnership was formed would arise out of the partnership relation.

If, however, the contract calls for the purchase of land by one party from the other before the partnership comes into existence it is within the statute. Clancy *v.* Craine, 2 Dev. Eq. 363. And a contract which called for the entrance into a partnership after the expiration of a year would doubtless be held to be within the statute.]

(*e*) *Post,* § 159 *et seq.*

engaged in it all the rights, and lay upon them all the responsibilities, and give to third parties dealing with them all the remedies, which belong to partnership. Of this we shall treat somewhat in the succeeding chapters.

§ 8. **Illegal Partnerships.** — That the contract may be legal, it must be formed for a legal purpose. (*g*) It is obvious that the law — through the courts — cannot protect or enforce what the law forbids. Hence a partnership would be deemed illegal, not only if it contemplated a business which the law expressly prohibits, as smuggling, gambling, making counterfeit bills or false coin to be used at home, or stealing, but also if it were formed for a purpose distinctly opposed to the principles or policy of the law; as, to procure the election of persons to office, or the success of a political party, or for marriage brokerage. (*h*) [1]

(*g*) The English law has at different periods laid various restrictions upon the formation of partnerships, some designed to secure monopolies to one or several large incorporated companies, and which have since been repealed or greatly modified, while others have aimed at the more laudable object of protecting the public from the combinations and the delusive schemes of speculators. Thus the statute of 6 Anne, ch. 22, § 9, made it unlawful for a partnership of more than six persons, other than the Bank of England, to carry on banking business. By 6 Geo. 1, ch. 18, § 12, partnerships were forbidden to engage in the business of marine insurance, or to make loans upon bottomry. In like manner, by 28 Geo. 3, ch. 53, § 2, partnerships of more than five persons for trading in lands are made illegal. See further 6 Geo. 1, ch. 18, § 18; also, 39 & 40 Geo. 3, ch. 99, regulating the pawnbrokers' trade. See Armstrong *v.* Lewis, 2 C. & M. 274; Armstrong *v.* Armstrong, 2 Mylne & K. 45; Gardon *v.* Slowden, 12 Clark & F. 237. There have also been certain restrictive statutes, which have been passed rather to protect the revenue of the realm than to afford security to the public. Hence it is held, in several cases, that, though a partnership be formed in disregard of the provisions of these statutes, yet such infringement will not deprive the partnership of the right to recover upon their contracts with third persons. Hodgson *v.* Temple, 5 Taunt. 181. Johnson *v.* Hudson, 11 East, 180; Brown *v.* Duncan, 5 B. & C. 93. [See the statutes collected and discussed, 1 Lindley, Part. *94 *et seq.*]

(*h*) A distinction was formerly made between contracts of partnership for objects which are *mala in se* and those for

[1] It is now everywhere acknowledged that the courts will not recognize an illegal contract of partnership, either by enforcing performance of the whole contract, Ewing *v.* Osbaldiston, 2 My. & Cr. 53; Durant *v.* Rhener, 26 Minn. 362, 4 N. W. 610; or by enforcing the obligation to account. Sykes *v.* Beadon, 11 Ch. D. 170; Bartle *v.* Coleman, 4 Pet. 184; Snell *v.* Dwight, 120 Mass. 9; Dunham *v.* Presby, 120 Mass. 285; Jackson *v.* McLean, 100 Mo. 130, 13 S. W. 393; Read *v.* Smith, 60 Tex. 379.

Some courts however allow a partner in an illegal partnership, after the business has been entirely wound up, the right to a share of such proceeds of the business as remain in his copartner's hands; on the more or less clearly recognized principle that there is a constructive trust. Sharp *v.* Taylor, 2 Phillips, 801 (criticised adversely in Sykes *v.* Beadon, 11 Ch. D. 170); Brooks *v.* Martin, 2 Wall. 70; Wann *v.* Kelly, 5 F. R. 584; Attaway *v.* Third Nat. Bank, 15 Mo. App. 577; Pfeuffer *v.* Maltby, 54 Tex. 454 (*semble*; but see Read *v.* Smith, 60 Tex. 379). See Snell *v.* Dwight, 120 Mass. 9, 18. In Texas the court interferes only if there has been an account stated, and a note given

§ 9. **Partnership must be Voluntary.** — The contract of partnership must be voluntary; that is, all the partners must consent

objects which are only *mala prohibita*. It was held that contracts arising out of the transactions of a partnership, formed for purposes which were inhibited by positive statute *merely*, might be recognized and enforced by the courts, if they were one step removed from the illegal contract itself. *Ex parte* Balmer, 13 Ves. 313; Faikney *v.* Reynous, 4 Burr. 2069; Petrie *v.* Hannay, 3 T. R. 418; Watts *v.* Brook, 3 Ves. 612. See also Berkshire *v.* Evans, 4 Leigh, 223. But these cases were in conflict with previous adjudication, and cannot be regarded as decided upon sound principles. Sullivan *v.* Greaves, Park on Ins. 8; Bensley *v.* Bignold, 5 B. & Ald. 335; Mitchell *v.* Cockburne, 2 H. Bl. 379; Aubert *v.* Maze, 2 B. & P. 371; Ewing *v.* Osbaldiston, 2 My. & Cr. 53. See also Cannan *v.* Bryce, 3 B. & Ald. 179; Steers *v.* Lashley, 6 T. R. 61; Brown *v.* Turner, 7 T. R. 630; Webb *v.* Brooke, 3 Taunt. 6; Simpson *v.* Bloss, 1 Taunt. 246; Ottley *v.* Browne, 1 Ball & B. 360; *Ex parte* Randleson, 1 Mont. & M'A. 36, and cases cited. Nor will the courts any more sustain an action brought in revocation and disaffirmance of an illegal contract of partnership. Booth *v.* Hodgson, 6 T. R. 405; *Ex parte* Bell, 1 M. & S. 751.

for the balance. Boggess *v.* Lilly, 18 Tex. 200; De Leon *v.* Trevino, 49 Tex. 88; Read *v.* Smith, 60 Tex. 379. See also McGunn *v.* Hanlin, 29 Mich. 476.

But by the weight of authority a bill for an account will not lie in case of an illegal partnership, though the business is wound up and the assets are all in the hands of the defendant partner. Everet *v.* Williams, 1 Lind. Part. * 93 *n.*; Sykes *v.* Beadon, 11 Ch. D. 170 (*semble*); Craft *v.* McConoughy, 79 Ill. 346; Hunter *v.* Pfeiffer, 108 Ind. 197; Snell *v.* Dwight, 120 Mass. 9, 18 (*semble*); Jackson *v.* McLean, 100 Mo. 130, 13 S. W. 393; Todd *v.* Rafferty, 30 N. J. Eq. 254; Woodworth *v.* Bennett, 43 N. Y. 273; King *v.* Winants, 71 N. C. 469; Watson *v.* Fletcher, 7 Gratt. 1. Nor is the action allowed though an account has been stated, and the defendant has expressly agreed to pay the balance. Stewart *v.* McIntosh, 4 H. & J. 233; Patterson's Appeal, 13 W. N. C. 154; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173. And though the business was legal where it was carried on, the courts of a State in which it is regarded as against public policy will not entertain a bill for an account. Watson *v.* Murray, 23 N. J. Eq. 257. But though equity will not sustain a bill for an account of illegal partnership transactions, yet, if a part of the business of the partnership be legal and a part illegal, an account of that which is legal may be directed; as where the business of a firm was that of brokers and underwriters, the court dismissed so much of the bill as sought for an account of the profits of the underwriting business, but decreed an account of the other business. Knowles *v.* Haughton, 11 Ves. 168; Anderson *v.* Powell, 44 Ia. 20; Willson *v.* Owen, 30 Mich. 474. And where the business was legal when the partnership was formed, but was afterwards forbidden by statute, a partner may have an accounting as to the business done before the statute came into effect. Bennett *v.* Woolfolk, 15 Ga. 213.

Where it appears that the profits of the firm were swelled by cheating customers, the fact is no defence to a bill for an account brought by the innocent partner. Todd *v.* Pennington, 21 Atl. 297 (N. J.). And it has been held that even if both parties were concerned in the fraud upon customers, a bill will lie whenever the partnership was formed for a legal purpose. Shriver *v.* McCloud, 20 Neb. 474, 30 N. W. 534. In Illinois, on the other hand, where one member of a legal partnership received bribes in the course of the firm business the other partner was held not to be entitled to an account of the money thus received. Northrup *v.* Phillips, 99 Ill. 449. Where the business of pawnbrokers was carried on by two persons under a deed of partnership, but under the apparent conduct and in the name of one, and he only was licensed, *semble*, that although the parties might have made themselves liable to the penalties

and agree to it. This is so essential, that no person can be introduced into a firm without the consent of all who are members of it. (*k*) This consent may be implied; (*l*) and even if one or more members were reluctant, and made objections, and never expressly gave their assent, still it might be inferred from their acts, if the alleged partner or partners were treated by the other partners and in their transactions as only a partner could be or should be treated. (*ll*) Still there must be this consent; and we shall presently see that if a partner sells out all his interest in a firm

(*k*) *Ex parte* Barrow, 2 Rose, 255; Kingman *v.* Spurr, 7 Pick. 235; Murray *v.* Bogert, 14 Johns. 318; Channel *v.* Fassit, 16 Ohio, 166; Moddewell *v.* Keever, 8 W. & S. 63; Nicoll *v.* Mumford, 4 Johns. Ch. 522. Partnerships *inter sese* can only be formed by the contract of the parties. Freeman *v.* Bloomfield, 43 Mo. 391; Metcalf *v.* Redmon, 43 Ill. 264. See Brown *v.* De Tastet, Jacob, 284; Bray *v.* Fromont, 6 Madd. 5; Mathewson *v.* Clark, 6 How. 122; Goddard *v.* Hodges, 1 Cr. & M. 33. Upon this principle of *dilectus personæ*, neither the representatives of a deceased partner, nor the assignees of one bankrupt, become partners with the surviving or solvent partners, but are simply entitled to an account. Pearce *v.* Chamberlin, 2 Ves. 33; Marquand *v.* N. Y. Man. Co., 17 Johns. 525; Griswold *v.* Waddington, 15 Johns. 82. [Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98.] In the civil law, the doctrine was even carried to the length of making null and void stipulations in the articles of association that heirs or representatives should themselves be partners. Otherwise in the English and American law. See *post*, § 106.

(*l*) Mason *v.* Connell, 1 Whart. 381. The question in this case was, whether the firm of A. & B. was partner with C. The evidence offered on this point was a written agreement of copartnership to which was signed the name of C., and also the name of the firm of A. & B., in the handwriting of A. It was held that engaging the firm in such a partnership was out of the ordinary commercial transactions, and was therefore presumed to be without the scope of one partner's authority. But, though the consent of each partner was absolutely necessary to constitute a partnership, yet that such consent might be testified in express terms, or the assent might be tacit, or to be implied solely from the acts and conduct of the parties.

(*ll*) Pierce *v.* Whitley, 39 Ala. 172.

imposed by 39 & 40 Geo. 3, ch. 99, yet that, it being no part of the contract to carry on the partnership in such a manner as to contravene the law, the contract was not void; but that, had a collateral agreement to carry on the partnership, in violation of the act of parliament, been proved, no rights could have been acquired under it by either party. Armstrong *v.* Lewis, 2 Cr. & M. 274.

It is clear that, at least as to third persons, the title to property is recognized as in the partnership. Crescent Ins. Co. *v.* Bear, 23 Fla. 50, 1 So. 318; Tucker *v.* Adams, 63 N. H. 361. Real estate standing in the name of both partners belongs to them in common. Watson *v.* Fletcher, 7 Gratt. 1.

It has been held that an association to build a railroad, by procuring a charter for a corporation of which the partners should be the stockholders, and then making a contract for construction between the corporation and the partnership by which the stock and bonds of the railroad should be given to the latter and sold by it, was formed for a fraudulent purpose, and was therefore illegal. Jackson *v.* McLean, 100 Mo. 130, 13 S. W. 393. On the other hand a partnership to buy land at a tax sale is not illegal without proof that it was formed or necessarily tended to stifle competition. Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106.

to a third person, and expressly agrees with him that he shall take the seller's place in the partnership, this will not make him a partner, unless the other partners receive him as such. (*m*)

If the articles of the copartnership provided, somewhat in the way those of joint-stock companies do, that a copartner might, in a certain way, and upon certain terms, transfer all his interest and rights in the company to a third person, who should, by force of the transfer, become a copartner in the transferrer's stead, a court of equity generally would, and a court of law might, so far recognize the force of this provision as to hold such transferee partner at once. (*n*) It is certain, however, that a mere agreement to admit a new member into a partnership, like an agreement to form a partnership, (*o*) however expressed, and on whatever consideration, would not of itself invest any person or persons with the character of partners, although the breach of it might give an action for damages. (*p*)

We shall hereafter see that, in reference to transfer and to incoming partners, the courts pay great respect to that "*dilectus personarum*," by which partners, who are so much in the power of each other, may protect themselves from the danger of having that power pass into hands to whom they would not willingly intrust it. (*q*)

§ 10. **Partnership Agreement vitiated by Fraud.** — Every contract that is vitiated by fraud, or by coercion, is thereby avoided and annulled. This is certainly true of the contract of partnership; and, from the peculiar character of the relation of partners, and of their almost unrestricted capacity to do each other an injury, it may be thought that courts would be peculiarly watchful to require that this contract was formed deliberately and freely, and without deception or undue or wrongful influence. (*r*)

§ 11. **Parties must be competent.** — So, too, that the contract of partnership may be lawful, it must be made by competent parties; that is, by those who have a legal right to enter into it. And we shall hereafter see that competency to enter into partnership is

(*m*) See *post*, § 106.

(*n*) Fox *v.* Clifton, 9 Bing. 15. See Kingman *v.* Spurr, 7 Pick. 236; Alvord *v.* Smith, 5 Pick. 232; Cochran *v.* Perry, 8 W. & S. 262. See also *post*, § 107.

(*o*) Wilson *v.* Campbell, 5 Gilman, 383; Howell *v.* Brodie, 6 Bingham, N. C. 44.

(*p*) Figes *v.* Cutler, 3 Stark. 139; M'Neil *v.* Reid, 9 Bing. 68, 2 Moo. & Sc. 89; Byrd *v.* Fox, 8 Mo. 574. See *post*, § 191.

(*q*) See *post*, § 106.

(*r*) Tattersall *v.* Groote, 2 B. & P. 131; *Ex parte* Broome, 1 Rose, 69; Green *v.* Barrett, 1 Sim. 45; Pillans *v.* Harkness, Colles P. C. 442; Hynes *v.* Stewart, 10 B. Mon. 429; Howell *v.* Harvey, 5 Ark. 270; Fogg *v.* Johnston, 27 Ala. 432. See *post*, ch. 14.

almost or quite coextensive with a competency to transact business generally. (*s*)

§ 12. **Time of beginning.** — It is sometimes important to determine when a partnership begins. Usually, this is determined by the contract of partnership. If not, it would probably be held as presumption of law that it began when the written articles were executed. (*t*) But even if in the contract of partnership it were expressly stipulated that it should have a retrospective effect, and that the partnership should begin a certain time before the date, it might bind the parties to it, for some purposes at least; but could not make them partners at the time stipulated, in reference to third parties, except from the date. (*u*)

If the agreement of copartnership is executory and conditional, no partnership is created by it until all the conditions are fulfilled. (*v*)

In one case, in which the partnership was unlawful if entered upon on the day of the date of the articles, and lawful if it began three months afterward, the court held it to be an absolute presumption of law that it began on the day of the date, although nothing in the articles specially indicated it. And the court refused evidence that the bargain and intention of the parties was not to enter upon the partnership until it should be legal. This case seems not to be good law; although it would be proper to exclude evidence which contradicted an express provision. (*w*)

(*s*) See *post,* § 14.

(*t*) Howell *v.* Brodie, 6 Bing. N. C. 108; Aspinwall *v.* Williams, 1 Ohio, 38; Austin *v.* Williams, 1 Ohio, 282; Grant *v.* Watts, 10 Paige, 82; Ingraham *v.* Foster, 31 Ala. 123; Beaman *v.* Whitney, 20 Me. 413. [Guice *v.* Thornton, 76 Ala. 466.]

(*u*) Thus, where A. & B. who were already in partnership, agreed on the 24th of June to become partners with C., and it was farther agreed that the new partnership should be considered as commencing from the 18th of May preceding; held, that C. was not liable as a partner upon a bill of exchange indorsed by the firm of A. & B. upon the 19th of May. Vere *v.* Ashby, 10 B. & C. 288; Wilsford *v.* Wood, 1 Esp. 182. See Dyke *v.* Brewer, 2 Car. & K. 828. On the other hand, if A., B., and C. agree to enter into partnership on the first of January, and from that time regard themselves as partners, the partnership will be held to have commenced on that day, though the deed of partnership be not executed till the 18th of January. Battley *v.* Bailey, 1 Scott N. R. 143.

(*v*) Fox *v.* Clifton, 6 Bing. 776; Dickinson *v.* Valpy, 10 B. & C. 128; Murray *v.* Richards, 1 Wend. 58. See further Ward *v.* Thompson, 1 Newb. Adm. 95; Bisset on Part., part 2d, ch. 6; Story on Part., § 150; Avery *v.* Louve, 1 La. Ann. 457; *post,* ch. 18. See Peck *v.* Thomas, 29 Eng. L. & Eq. 276. [So where the agreement contemplates the obtaining of land, from which the partnership is to realize its profit, the partnership would not generally begin till the land is obtained. Snodgrass *v.* Reynolds, 79 Ala. 452; Meagher *v.* Reed, 14 Col. 335, 24 Pac. 681.

An agreement to enter into a partnership in the future does not make the parties partners: they do not become so until the agreement is performed and the partnership launched. Goldsmith *v.* Sachs, 17 F. R. 726, 8 Sawy. 110]

(*w*) Williams *v.* Jones, 5 B. & C. 108.

Where the partnership was not formed by any express agreement, written or oral, but implied by law from certain joint transactions, it would be held to begin when these transactions took place, or perhaps when the agreement to enter into them was formed. (*x*) Thus, if there were such a joint buying of property with the intention of joint selling, as would make the parties partners in law as to their property or business, they would be partners, not only when the thing was bought, but they might become partners as to this purchase by their agreement to join and act, although no responsibilities as partners would rest upon them until something was done to carry the agreement into effect.[1]

§ 13. **Jurisdiction of Partnership Suits.** — It may be well to remark, in this connection, that courts of common law cannot take cognizance of a large proportion of the cases which arise under the law of partnership. Nearly all of those which relate to the rights and obligations of partners *inter se* go into a court of equity. We shall hereafter see that one partner can sue another at law only in a few exceptional cases. And when the settlement of the affairs of a partnership is required, or the taking of an account, or the prevention or discontinuance of some wrongful act, or the protection or enforcement of a right by other means

See Dix *v.* Otis, 5 Pick. 38; Vassar *v.* Camp, 14 Barb. 356; Bird *v.* Hamilton, Walker Ch. 361. In this last case the contract of partnership was executed the 16th of May. The language imputed a partnership *in præsenti.* But, inasmuch as the business of the partnership could not be entered upon until the 1st of July, the court, regarding the situation of the parties, construed the partnership not to commence until that time.

(*x*) Gardiner *v.* Childs, 8 C. & P. 345. The firm, C. & D., defendants, were printers. The present action was brought to recover of them the price of a certain amount of paper delivered to them by the plaintiffs, but at the order and upon the credit of the firm of A. and B., publishers. The plaintiffs, to prove the existence of a partnership between the defendants and A. and B. in certain publications for which the paper was furnished and used, put in evidence accounts between the two firms, determining their respective shares of the profits accruing from such publications. These accounts bore dates from January, 1836, to February, 1837. The paper was supplied in April and May, 1836. Upon this state of facts, Ld. Denman, C. J., left it to the jury to say whether, *at the time the goods in question were furnished,* the defendants were partners in the concern upon whose credit they were supplied. The jury finding that they were, judgment was rendered for the plaintiffs. See Avery *v.* Louve, 1 La. Ann. 457.

[1] Where the agreement contemplates joint action at once, though not in the business of the partnership, — as where the parties are to join in equipping a factory, — the partnership begins at once. Kerrick *v.* Stevens, 55 Mich. 167, 20 N. W. 888. And so if action is to begin at once the partnership begins, though the profit is not to be divided till one of the partners is reimbursed for his outlay. Beauregard *v.* Case, 91 U. S. 134; Bybee *v.* Hawkett, 12 F. R. 649.

than damages for a breach of it, the parties necessarily resort to equity. Hence there is certainly no branch of commercial law (to which partnership emphatically belongs) that so often finds the common-law jurisdiction inadequate to its wants, and is therefore obliged to resort to equity for relief. As we go on, we shall endeavor to point out specifically, in reference to the various questions and conflicting claims which are frequently springing up under the law of partnership, the methods and measures of relief which equity administers.

CHAPTER III.

OF PARTNERS.

§ 14. **Who may be Partners.** — There is nothing in this country to prevent any number of persons from entering into partnership. Nothing but their own convenience and pleasure determine this. (*a*)

As to personal competency, it may be said that any persons competent in law and in fact to transact ordinary business on their own account may enter into partnership for that purpose. For there is nothing in the *status* of partnership, which, on the one hand, confers a power to transact business on one who otherwise would have no power, or, on the other, restrains or diminishes the power in him who possesses it before or without partnership.

We have said competent in law and in fact, because there are incompetencies created by the law, or absolutely presumed, without any reference to the actual fact; (*b*) as in the case of an

(*a*) But now, in England, by "The Companies Act" of 25 & 26 Vict. 1862, consolidating and amending former acts upon the subject, no partnership consisting of more than twenty persons, which has for its object the acquisition of gain, is allowed to carry on business without forming a company by registration; and under the provisions of this act any seven or more persons may so associate, with or without limited liability, as they may elect and declare.

(*b*) In England, the statute 57 Geo. 3, ch. 99, § 3, rendered all spiritual persons incompetent *in law* to carry on, by themselves or their agents, "any trade or dealing for gain or profit," and of course thereby interdicted such persons from being partners for that purpose. Hall *v.* Franklin, 3 M. & W. 259. See 1 & 2 Vict. ch. 106. So also the law sometimes renders all persons who have not been qualified in a prescribed legal way incompetent to exercise particular trades or professions. Thus, by 5 Eliz. ch. 4, persons were prohibited from following any manual art or occupation who had not previously served an apprenticeship to the same. But one who, though he had not been apprenticed, was a partner with a brewer, was held not within the statute, since he had not acted in nor personally exercised the trade. Reynard *v.* Chase, 2 Wils. 40. See 22 Geo. 2, ch. 46, § 11, an act to prevent unqualified persons from acting as attorneys or solicitors. *In re* Jackson, 1 B. & C. 270; *In re* Clark, 3 D. & R. 260; Hopkinson *v.* Smith, 1 Bing. 13; Candler *v.* Candler, Jac. 225; Sterry *v.* Clifton, 9 C. B. 110; Taylor *v.* Glassbrook, 3 Stark. 76. In Gilfillan *v.* Henderson, 2 Cl. & F. 1, two solicitors had entered into partner-

infant, who cannot lawfully do, the day before he is twenty-one, what he may do on that day. So a married woman is disabled at common law, although in fact she may have far greater business capacity than her husband. An insane person is disabled by the fact of his insanity; and whether insanity exists, and in a sufficient degree to have this effect, must be a question of fact only. And some difficulty, to say no more, attends the entering into a copartnership of a corporation as a member of the firm. We will, however, look at some of these questions more specifically.

§ 15. **Infants.** — Infants are persons under twenty-one years of age; and, for their own benefit and safety, the law considers them disqualified for the transaction of business. Their contracts or promises for necessaries — such as shelter, food, raiment, and such other means of support and education as are proper for them — are valid and obligatory, because it is for their interest that they should be able to bind themselves for the things they must have, or suffer from the want of them. But the promise of an infant in any business transaction is voidable by him; because it is not necessary that he should earn money by buying and selling. (*d*)

The promise is voidable only (if made by an infant mentally and physically able to make it), and not, in any case absolutely void, as it used to be called. (*e*)

ship, one of whom could practise only in a superior court, the other only in an inferior court. By their agreement the profits of their general business were to be divided; each was to recommend clients to the other, and the existence of the partnership was to be kept secret. It was held that the agreement was illegal and void. See *In re* Woodward, 4 Johns. 289.

(*d*) 1 Rol. Abr. 729; Whittingham *v.* Hill, Cro. Jac. 494; Whywall *v.* Champion, 2 Stra. 1083; Dilk *v.* Keighley, 2 Esp. 480; Goode *v.* Harrison, 5 B. & Ald. 147; Van Winkle *v.* Ketchum, 3 Caines, 323; Smith *v.* Mayo, 9 Mass. 62; Mason *v.* Wright, 13 Met. 306; Crabtree *v.* May, 1 B. Mon. 289.

(*e*) The supposed doctrine of the common law, that there are some contracts of an infant, namely, those which the courts can pronounce to be to his prejudice, which are absolutely void, is recognized and asserted in a very great number of cases. Keane *v.* Boycott, 2 H. Bl. 511; Bayley, J., in Thornton *v.* Illingworth, 2 B. & C. 826; Fisher *v.* Mowbray, 8 East, 330; Baylis *v.* Dineley, 3 M. & S. 477; Tucker *v.* Moreland, 10 Pet. 58; Vent *v.* Osgood, 19 Pick. 572; Lawson *v.* Lovejoy, 8 Me. 405; Rogers *v.* Hurd, 4 Day, 57; Pool *v.* Pratt, 1 D. Chip. 252; McGaw *v.* Marshall, 7 Humph. 121; M'Minn *v.* Richmonds, 6 Yerg. 9; M'Crillis *v.* How, 3 N. H. 348; Swasey *v.* Vanderheyden, 10 Johns. 33; United States *v.* Bainbridge, 1 Mason, 71; Fridge *v.* The State, 3 Gill & J. 103; Ridgeley *v.* Crandall, 4 Md. 435; Cronise *v.* Clark, 4 Md. Ch. 403. But the doctrine of the text seems more sound in principle and more practical of application, and is supported by the later authorities. Williams *v.* Moor, 11 M. & W. 256; Fonda *v.* Van Horne, 15 Wend. 631; Breckenbridge *v.* Ormsby, 1 J. J. Marsh.

The contract of partnership is like all other mercantile contracts, and may be made by an infant for his own benefit, subject to his right to avoid it. (*ee*) [1]

236; Scott *v.* Buchanan, 11 Humph. 468; Cummings *v.* Powell, 8 Texas, 80; Cole *v.* Pennoyer, 14 Ill. 158; Robbins *v.* Cutler, 26 N. H. 173; Weaver *v.* Jones, 24 Ala. 420; Hardy *v.* Waters, 38 Me. 450; Ferguson *v.* Bell, 17 Mo. 347; Strain *v.* Wright, 7 Ga. 568; 1 Am. Lead. Cas. 103; Taft *v.* Sergeant, 18 Barb. 320.

(*ee*) Crabtree *v.* May, 1 B. Mon. 289; Glossop *v.* Colman, 1 Stark. 25. Hence, an infant may be a partner in a mercantile house, his father supplying the capital; and if the transaction be a *bona fide* one, and the son be the real party in interest, and the father retain no power of withdrawing from the firm either the capital or the profits, an agreement that the firm shall account to the father as trustee for his son for one-third profit of his son's capital, or any loss that may accrue, and be governed by his advice in all business matters, will not make the father a partner. Barklie *v.* Scott, 1 Hud. & Bro. 83. But, though an infant coming of age may avoid his contract, he cannot recover of persons who have dealt with the partnership money expended by him in its affairs, for which he has received and enjoyed a valuable consideration. Holmes *v.* Blogg, 8 Taunt. 508. But where A., an infant, made an agreement of copartnership with B., and paid to him a hundred pounds, to be forfeited if, when he came of age, the partnership deed was not duly executed by him, the jury finding that A. had paid the money on a fraudulent representation in B.'s balance sheet, A., attaining his majority and disaffirming the contract, was allowed to recover back the deposit. Corpe *v.* Overton, 10 Bing. 252. This last case differs from Holmes *v.* Blogg in many important fea-

[1] The infant partner who has not disaffirmed has all the rights and is subject to the duties of a partner. Thus his copartner may maintain a bill for dissolution and account, because of the infant's misconduct. Bush *v.* Linthicum, 59 Md. 344. But he has a right to protection against liability, and therefore he may set up his infancy in defence to a personal claim against him by a partnership creditor, Pelletier *v.* Couture, 148 Mass. 269, 19 N. E. 400; Folds *v.* Allardt, 35 Minn. 488, 29 N. W. 201; and where his partner is allowed to file a bill for a dissolution, the infant cannot be charged with costs. Bush *v.* Linthicum, 59 Md. 344.

Where the infant puts capital into the partnership, the better view is that he cannot upon disaffirming the contract withdraw his capital. Pelletier *v.* Couture, 148 Mass. 269, 19 N. E. 400; Dunton *v.* Brown, 31 Mich. 182; Foot *v.* Goldman, 68 Miss. 529, 10 So. 62; Hill *v.* Bell (Mo.), 19 S. W. 959. And if he gives his time to the business he cannot recover the value of his services from his copartner. Page *v.* Morse, 128 Mass. 99. Even after dissolution, the assets are to be distributed according to the articles; if there has been a loss, the infant must bear his share. Moley *v.* Brine, 120 Mass. 324.

If the infant paid a premium to gain entrance to the firm, he cannot upon disaffirming the contract, recover the amount of the premium. *Ex parte* Taylor, 8 DeG. M. & G. 254.

It has however been held in New York that an infant may rescind the contract of partnership and recover the amount of his contributions, less what he has received from the partnership. Sparman *v.* Keim, 83 N. Y. 245. Even in that State, however, it would seem that this cannot be done if it would prejudice creditors of the partnership. Yates *v.* Lyon, 61 N. Y. 344.

The infant's right to disaffirm extends to all transactions, it would seem, except as limited by rights acquired against the firm by third parties. Thus he may avoid an assignment of the firm property for the benefit of creditors made either by himself or by his partner. Foot *v.* Goldman, 68 Miss. 529, 10 So. 62.

§ 16. **Ratification after Coming of Age.** — A promise of an infant may be ratified by him after he is of full age. And this ratification may be direct and express, or it may be implied by his acts, or even his silence, or inferred by law from circumstances. In England, no ratification, after full age, binds an infant, unless made in writing and signed by him. (*f*) A similar statute exists in Maine. (*g*) It is not quite certain how this requirement would affect a ratification by a continuance of the partnership and business. If, for example, a young man of the age of twenty entered into a partnership, and at twenty-one took no notice of his having been an infant, but continued in the partnership and in the same business for a year or two more, and the firm was then called on to settle an account running through all these years, it is doubtful if, under this statute, the infant would be permitted to draw a line between the items, and hold himself responsible only for those which were subsequent to his majority. In this country generally, one who was an infant may not only ratify after coming of age any promise to which there is no other objection than the fact of the previous infancy, but may ratify this by any conduct of an unequivocal character, which must be understood either as a ratification, or else as fraud or as gross negligence on his part. (*h*) [1]

tures. The court, however, distinguish it from that case only upon the ground that in the one the infant had, and in the other he had not, enjoyed a valuable consideration for the money he sought to recover back.

(*f*) 9 Geo. 4, ch. 14, § 5. In the construction of this statute, it has been held that "any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification." Harris *v.* Wall, 1 Exch. 122. See Mawson *v.* Blane, 10 Exch. 206. In Hartley *v.* Wharton, 11 A. & E. 934, the writing by which the ratification was alleged to be made was a letter, without date or address, containing a promise to remit within a short time, but mentioning no sum nor any particular debt. It was held, nevertheless, that this was a ratification which satisfied the statute, and that the date, address, and debt might be proved by parol.

(*g*) Acts of Maine, 1845, ch. 166. See Thurlow *v.* Gilmore, 40 Me. 378.

(*h*) Martin *v.* Mayo, 10 Mass. 137; Whitney *v.* Dutch, 14 Mass. 457; Pierce *v.* Tobey, 5 Met. 168; Orvis *v.* Kimball, 3 N. H. 314; Aldrich *v.* Grimes, 10 N. H. 194; Robins *v.* Eaton, 10 N. H. 561; Edgerly *v.* Shaw, 25 N. H. 514; Boyden *v.* Boyden, 29 N. H. 519; Delano *v.* Blake, 11 Wend. 85; Bigelow *v.* Grannis, 2 Hill (N. Y.), 120; Taft *v.* Sergeant, 18 Barb. 320; Lawson *v.* Lovejoy, 8 Me. 405; Richardson *v.* Bright, 9 Vt. 368; Best *v.* Givens, 3 B. Mon. 72; Cheshire *v.* Barrett, 4 McCord, 241; Bobo *v.* Hansell, 2 Bailey, 114; Eubanks *v.* Peak, 2 Bailey, 497; Alexander *v.* Heriot, Bailey Eq. 223; Thomasson *v.* Boyd, 13 Ala. 419; Forsyth *v.* Hastings, 27 Vt. 646.

[1] **An infant partner who continues his connection with the business after coming of age ratifies all partnership transactions during his infancy. Salinas *v.* Bennett, 33 S. C. 285, 11 S. E. 968.**

But a mere acknowledgement that the debt exists is not of itself a ratification of a promise to pay the debt. (*i*)

If we suppose that an infant enters into a partnership, holding himself out by his declarations, or by the plain indication of circumstances, as an adult, and, after he comes of age, does not expressly withdraw or give any equivalent notice, persons dealing with the firm in the belief that the former infant was still a partner would hold him liable; because, whether he was a partner or not, he permitted the firm to use his credit, and he, and not an innocent third party, must suffer the consequences. (*j*)

In general, an infant partner who comes of age should, with no unnecessary delay, leave the firm, and declare himself not responsible for its debts, if he intends to take that course; for any considerable delay would bind him like a ratification, because it could be accounted for only by criminal neglect or fraud. (*k*)

(*i*) Thrupp *v.* Wilder, 2 Esp. 628; Goodsell *v.* Myers, 3 Wend. 479; Millard *v.* Hewlett, 19 Wend. 301; Smith *v.* Mayo, 9 Mass. 62; Ford *v.* Phillips, 1 Pick. 202; Thompson *v.* Lay, 4 Esp. 48; Benham *v.* Bishop, 9 Conn. 330; Wilcox *v.* Roath, 12 Conn. 550; Hale *v.* Gerish, 8 N. H. 374; Robbins *v.* Eaton, 10 N. H. 561; Ordinary *v.* Wherry, 1 Bailey, 28; Alexander *v.* Hutcheson, 2 Hawks, 535; Hindy *v.* Margarity, 3 Barr, 428.

(*j*) Goode *v.* Harrison, 5 B. & Ald. 147. Goode & Bennion, defendants below, had held themselves out as general partners in trade, especially by a joint purchase of goods of the plaintiff in April, 1818. At that time Bennion was an infant, though that fact was unknown to the plaintiff. There was evidence showing that Bennion did not intend to be a partner with Goode, except for the single transaction of April, 1818, and that he did not afterwards interfere with Goode's general business. In May following he became of age; but no notice of his having ceased to be a partner was ever given by him. Subsequently to his coming of age Goode bought more goods of Harrison in the name of the firm, and accepted a bill for them in the name of himself and Bennion. It was held that Bennion was liable on this bill; for, having shortly before he came of age represented himself as a partner, it was his duty to notify the plaintiff that he was not so when he came of age, as otherwise he facilitated the commission of a fraud upon the plaintiff.

(*k*) See Holmes *v.* Blogg, 8 Taunt. 35; 1 J. B. Moore, 466. In March, 1816, the firm of A. & B. leased certain premises for the purposes of their trade. A., an infant, in the presence of B., advanced one half of the amount of the rent. For the other half three bills were drawn upon the firm, and accepted by A. in the names of himself and partner, the first bill payable in four months. In June, A. reached his majority, and immediately dissolved the partnership; but, though his name was taken from the door shortly afterwards, no notice was given of his avoidance of the lease till nearly four months afterwards. Dallas, J., said: "I agree that in every instance of a contract, voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and, if the case before the court were that simple case, I should be disposed to hold, that, as the infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance in reasonable time." But it seems that notice of disaffirmance of an infant's contract may be dispensed with by the acts of the party to whom it would otherwise be due. The lessor, in this case, having, after the dissolution of the partnership, made a new arrangement with B., A.'s copartner, by which a part of the rent was remitted,

§ 17. **Avoidance of Contract.**—It may be well to remark that the right of an infant to avoid his contract gives no right of avoidance whatever to the other contracting party, who is bound if the infant does not choose to avoid the contract. (*l*) The

and having, when the first bill became due, sued B. alone upon it, and having afterwards compromised the action, and accepted from B. alone a surrender of the lease, and cancelled the other bills, all this without the privity of A., it was held that there should be a new trial, in order that the jury might determine whether, upon these facts, notice of disaffirmance had not been waived. The case, however, was ultimately decided upon other grounds. 8 Taunt. 508. The *dictum* of Dallas, J., above quoted, that an infant must disaffirm his contract within a reasonable time after coming of age, or his silence will bind him like a ratification, is established law in the English courts, and has been approved by eminent judges in this country. Cork & Bandon R. R. Co. *v.* Cazenove, 11 Q. B. 935; Leeds & Thirsk R. R. Co. *v.* Fearnley, 4 Exch. 26; Northwestern R. R. Co. *v.* M'Michael, 5 Exch. 114; Dublin & Wicklow R. R. Co. *v.* Black, 8 Exch. 181; Richardson *v.* Boright, 9 Vt. 368; Kline *v.* Bebee, 6 Conn. 494; Scott *v.* Buchanan, 11 Humph. 468. But the weight of American authority cannot be said to be in favor of the proposition that mere neglect to disaffirm will of itself amount to a ratification. There must, beside, be positive action on the part of him who has come of age clearly indicating his intention to abide by the contract which he has made during his infancy. Thus, in Dana *v.* Stearns, 3 Cush. 342, B., an infant, and S. had been in partnership, which was, however, dissolved by mutual consent before B. came of age. B. sold out his share to S., took therefor the note of S. with security, but never expressed any purpose of repudiating the partnership. In an action brought against B. & S., as partners, upon notes given by them while in business together, and in consideration of merchandise sold and delivered to them, it was contended that B. had ratified the partnership after coming of age, and therefore the notes in suit, by retaining and attempting to enforce the note of S. above mentioned, which was given by S. not only for the amount of capital originally contributed by B., but also in addition for B.'s share of the profits realized by the firm during their continuance in business. But the court held that no sufficient ratification was proved from these facts, and that B. was not liable for the partnership debts. See, to the same point, the note to the case of Dublin & Wicklow R. R. Co. *v.* Black, 8 Exch. 181, where the American authorities are reviewed. See also Jones *v.* Phœnix Bank, 8 N. Y. 228; N. H. Mut. F. Ins. Co. *v.* Noyes, 32 N. H. 345; Stokes *v.* Brown, 4 Chand. 39. A plea of infancy to a note executed by an infant partner in the name of the firm is not avoided by a replication that defendant had continued to be a partner for a year and more after he became of age, and had not during that time, nor for some years after, disaffirmed any note executed during his infancy in the name of the firm. There should also be an averment that he had knowledge of the particular contract declared on, and that he was looked to as a party to it. Crabtree *v.* May, 1 B. Mon. 289. In Miller *v.* Sims, 2 Hill (S. C), 479, an action was brought on a note signed by Sims in the name of Sims & Ashford. Ashford was, at the time of signing, a minor. After he came of age there was evidence that he received moneys due the firm, and signed the firm name, but refused to have anything to do with the note in question, and never ratified or confirmed it. The court held that if Ashford, after coming of age, did in any manner concur in carrying on the partnership business, or receive profits from it, it would amount to a ratification; and that, by affirming the partnership, Ashford recognized and affirmed the agency of Sims.

(*l*) Holt *v.* Ward, 2 Str. 937; Warwick *v.* Bruce, 2 M. & S. 205; Willard *v.* Stone, 7 Cow. 22; Parker *v.* Barker, 1 Clarke Ch. 136; Rose *v.* Daniel, 3 Brev. 438; Voor-

infant's privilege of avoiding his contracts extends to his legal representatives. (*m*)

A fiat or decree of bankruptcy against an infant is not voidable only, but wholly void at law. (*n*) Equity, however, will not declare it void if he has induced persons to give him credit as an adult member of the firm, but will leave him to his remedy at law. (*o*) But the fact that his name is used in the firm is not of itself sufficient to prevent equity from annulling the same. (*p*)

§ 18. **Effect of Plea of Infancy.** — If a contract be made with a firm, one of the members being an infant, and repudiating his own liability, it seems to be doubted whether the contract can afterwards be treated as a contract made with the other partners. (*pp*) It would seem, however, that it may. The technical

hees *v.* Wait, 3 Green, 343; M'Ginn *v.* Shaeffer, 1 Watts, 412; Cannon *v.* Alsbury, 1 A. K. Marsh. 76.

(*m*) Hussey *v.* Jewett, 9 Mass. 100; Martin *v.* Mayo, 10 Mass. 137; Jackson *v.* Mayo, 11 Mass. 147.

(*n*) O'Brien *v.* Currie, 3 C. & P. 283; Belton *v.* Hodges, 9 Bing. 365. The fiat is void, because a minor's contracts of trade being voidable, he cannot be a bankrupt for debts which he is not obliged to pay. Ibid.; Rex *v.* Cole, 1 Ld. Raym. 443; Lord Eldon, in *Ex parte* Adam, 1 Ves. & B. 494; *Ex parte* Moule, 14 Ves. 602. Hence also a joint commission of bankruptcy against a firm, one of the members of which is an infant, will be superseded. *Ex parte* Henderson, 4 Ves. 163; *Ex parte* Barwis, 6 Ves. 601. But where a statute provides that an adjudicated bankrupt, to test the validity of the commission, must show cause before the commissioner within seven days after the adjudication; or, to dispute or annul the fiat, must commence proceedings within twenty-one days after the advertisement of the bankruptcy, — a partner adjudged a bankrupt while an infant cannot after the lapse of the prescribed period maintain a petition praying, on the ground of his infancy, to have the adjudication and fiat annulled; there being in this respect no exception made of infants in the statute. *Ex parte* West, 2 De Gex, M. & G. 198. [But under the insolvency laws a firm may be declared insolvent though one partner sets up his infancy. The infant however cannot himself be involved in the proceedings. Pelletier *v.* Couture, 148 Mass. 269, 19 N. E. 400.]

(*o*) *Ex parte* Watson, 16 Ves. 265. The Lord Chancellor delivered his opinion as follows: "As it appears in this case that the petitioner held himself forth to the world as an adult, and *sui juris*, and traded in that character, and contracted debts to a considerable amount for two years previous to the commission, and as this petition is opposed on behalf of the creditors, I will make no order; but leave the bankrupt to his action at law, if he shall think proper so to do. I consider him no more entitled to any favor or assistance than a *feme covert* who lives apart from her husband, and holds herself out as a *feme sole*, and contracts debts, is entitled to any summary relief from the judges at common law; who always leave a woman of that description to make the best she can of her plea of coverture in any action brought against her, and constantly refuse to interfere so as to afford her any summary relief."

(*p*) As where A. takes B., his minor son, sixteen years old, into partnership. Though the names of A. & B. are put over the door of their place of business, B. is not by that circumstance so held out to customers as an adult partner as to lose the right of having annulled a joint fiat of bankruptcy issued against the firm of A. & B. *Ex parte* Lees, 1 Deacon, 705.

(*pp*) See Story Part. § 255.

rules of pleading in England require that if an action be brought against an infant (or one who was an infant at the time of the promise) and others, and infancy is pleaded, the plaintiff cannot proceed against the others, but he may bring a new action against them alone. (*q*) And if he brings an action originally against them alone, and the non-joinder of the infant is pleaded in abatement, the infancy is a sufficient replication, (*r*) although a ratification by him who has been an infant would be a good rejoinder. (*s*) In Massachusetts, New York, New Hampshire, Indiana, and Maine, it has been held that an action brought against all may be continued against the other parties when one of them pleads infancy; (*t*) and it is to be expected that this would be recognized as the American rule.

§ 19. **Married Women.** — A married woman is, by common law, incapable of trade, and therefore of entering into partnership. But, by the "custom of London," married women may sometimes be sole traders, (*u*) and the courts of this country are quite indulgent in permitting women whose husbands have deserted them — voluntarily, or by compulsion of law — to enter into business for their support. And it seems that any married woman who is capable of being a sole trader may also enter into a commercial partnership. (*v*)

(*q*) Chandler *v.* Parkes, 3 Esp. 76; Jaffray *v.* Frebain, 5 Esp. 47.

(*r*) Burgess *v.* Merrill, 4 Taunt. 469; 2 Vin. Ab. 68.

(*s*) Gibbs *v.* Merrill, 3 Taunt. 307. But such rejoinder must be supported by proof of a ratification made before suit brought. Thornton *v.* Illingworth, 2 B. & C. 824. In an action for a partnership debt, an infant partner must be made co-plaintiff. Teed *v.* Elworthy, 12 East, 210; Kell *v.* Nainby, 10 B. & C. 20.

(*t*) Woodward *v.* Newhall, 1 Pick. 500; Tuttle *v.* Cooper, 10 Pick. 281; Hartness *v.* Thompson, 5 Johns. 160; Robertson *v.* Smith, 18 Johns. 478; Morton *v.* Croghan, 20 Johns. 123; Judson *v.* Gibbons, 5 Wend. 224; *Ex parte* Nelson, 1 Cow. 424; Cutts *v.* Gordon, 13 Me. 474. The same is the rule in Indiana. Kirby *v.* Cannon, 9 Ind. 371. So, too, in New Hampshire. Gay *v.* Johnson, 32 N. H. 167. See also Wamsley *v.* Lindenberger, 2 Rand. 478; Cole *v.* Pennell, 2 Rand. 174; Barlow *v.* Wiley, 3 A. K. Marsh. 457; Slocum *v.* Hooker, 13 Barb. 536.

(*u*) Langham *v.* Bewett, Cro. Car. 68. In this case, the custom of London was read, to wit: "That a *feme sole* merchant is where the *feme* trades by herself in one trade, with which her husband doth not meddle, and buys and sells in that trade." But the city courts only, not the superior courts at Westminster, take notice of this custom, so that a *feme covert* cannot, by virtue of it, sue or be sued in the latter without her husband. Caudell *v.* Shaw, 4 T. R. 361; Beard *v.* Webb, 2 B & P. 93; Cosio *v.* De Bernales, 1 C. & P. 266, note.

(*v*) [Penn *v.* Whitehead, 17 Gratt. 503.] By the law of England a wife may act as a *feme sole*, if her husband has been banished, or has abjured the realm, or been transported, or if he has professed the Catholic religion. Co. Litt. 132 b, 133 a; Lean *v.* Schutz, 2 W. Bl. 1195; Corbett *v.* Poelnitz, 1 T. R. 5; Marshall *v.* Rutton, 8 T. R. 545; Carroll *v.* Blencow, 4 Esp. 27; Marsh *v.* Hutchinson, 2 B. & P. 231; *Ex parte* Franks, 1 Moo. & Sc. 1. So, also, if her husband is an alien, who has never resided in England. Deerly *v.* Mazarine,

§ 20. **Statutory Changes.** — Legislation in this country has made the most important and extensive additions to the powers of married women. So early as 1718, in Pennsylvania, and 1744, in South Carolina, the privileges of *feme sole* traders by the custom of London were extended to married women in those States, which were then colonies. (*w*) Within the last few years, the legislatures of very many States have made much greater innovations upon the law of husband and wife. The various statutes differ of course in their details, but, in general, their object and scope are the same.[1]

1 Salk. 116; De Gallou *v.* L'Aigle, 1 B. & P. 357; Marsh *v.* Hutchinson, 2 B. & P. 226; Farber *v.* Granard, 4 B. & P. 80; Walford *v.* De Pienne, 2 Esp. 554; Franks *v.* De Pienne, 2 Esp. 587; Kay *v.* Pienne, 3 Camp. 123. The principle upon which the English courts have proceeded in these cases is, that, in the view of the law, the husband has no civil existence, and that the wife is therefore in a state of civil widowhood. In this country, the same exceptions to the disability of married women to make and to be bound by contracts have been recognized by the courts. Gregory *v.* Paul, 15 Mass. 31; Robinson *v.* Reynolds, 1 Aik. 174; Cornwall *v.* Hoyt, 7 Conn. 420; Wright *v.* Wright, 2 Desau. 244; Boyce *v.* Owens, 1 Hill (S. C.), 8; M'Arthur *v.* Bloom, 2 Duer, 151. And, if a man has never lived in that State of the Union in which his wife resides, he is, so far as that State is concerned, an alien, and his wife is treated as a *feme sole*. Abbot *v.* Bayley, 6 Pick. 89. But American courts have also gone farther, and have held a separation from and abandonment of the wife, coupled with an intent to renounce *de facto* the marital relation, to operate like an abjuration of the realm, and to invest the wife with the rights of a *feme sole*. And in some cases slight circumstances have been considered sufficient to constitute such desertion and renunciation. Bogget *v.* Frier, 11 East, 301; Gregory *v.* Pierce, 4 Met. 478; Rhea *v.* Rhenner, 1 Pet. 105; Valentine *v.* Ford, 2 P. A. Browne, 193; Bean *v.* Morgan, 4 McCord, 148; Love *v.* Moynehan, 16 Ill. 277; Krebs *v.* O'Grady, 23 Ala. 726. In Massachusetts, a wife divorced *a mensa et thoro* may sue and be sued as a *feme sole*. Dean *v.* Richmond, 5 Pick. 461; Pierce *v.* Barnham, 4 Met. 303. Otherwise in England. Lewis *v.* Lee, 3 B. & C. 291. Where a *feme covert* entered into agreement of partnership, providing for its duration beyond the death of her husband, and this agreement was executed, and the partnership continued beyond her husband's death until her own, it was held, that the copartnership related back to the execution of the articles, so as to give all parties the same rights and advantages as they would have been entitled to if the *feme covert* had been a *feme sole* at the date of their execution. Everit *v.* Watts, 10 Paige, 82.

(*w*) Burke *v.* Winkle, 2 S. & R. 189; Jacobs *v.* Fatherstone, 6 W. & S. 346; Newbiggin *v.* Pillans, 2 Bay, 462; McDowall *v.* Wood, 2 N. & McC., 242; Stark *v.* Taylor, 4 McCord, 413.

[1] It is still true that in the absence of express statutory authority a married woman cannot (with the exceptions already noticed) be a partner. De Graum *v.* Jones, 23 Fla. 83, 6 So. 925; Bradstreet *v.* Baer, 41 Md. 19; Brown *v.* Jewett, 18 N. H. 230; Gwynn *v.* Gwynn, 27 S. C. 525, 4 S. E. 229; Weisiger *v.* Wood, (S. C.) 15 S. E. 597; Frank *v.* Anderson, 13 Lea, 695; Brown *v.* Chancellor, 61 Tex. 437; Miller *v.* Marx, 65 Tex. 131; Carey *v.* Burruss, 20 W. Va. 571.

But under statutes which allow her to carry on business as if sole, she may form a partnership. Abbott *v.* Jackson, 43 Ark. 212; Dupuy *v.* Sheak, 57 Ia. 361; Vail *v.*

If a single woman was a member of a firm, — which she certainly may be, — no doubt the established principle, by which her marriage dissolved the partnership, would still prevail, generally at least, in this country. (*y*)

§ 21. **Ownership of Share in a Partnership.** — There are kinds of partnership, as joint-stock companies and the like, in which a partner may only own stock or shares, and take no part whatever in the active management of the concern. There is nothing to prevent a wife from holding such stock or shares; but her ownership — or partnership, if it should be so called — would seem to be that of her husband, and upon him would rest generally all the liabilities and obligations of a partner. (*z*) So, if a man's

(*y*) Watson on Part. 384; Gow on Part. 225. See *post*, ch. 12. And see Brown *v.* Jewett, 18 N. H. 230.

(*z*) Gow on Part. 2. In Dodgson *v.* Bell, 5 Exch. 57, the question was, whether the defendant was a partner in a joint-stock banking company in which, before and at the time of his marriage, his wife was a legally registered owner. After their marriage, the shares had continued to stand in the maiden name of defendant's wife, and she had received dividends and paid calls in respect of them, though without the knowledge of her husband, who never

Winterstein (Mich.), 53 N. W. 932; Newman *v.* Morris, 52 Miss. 402. *Contra*, Haas *v.* Shaw, 91 Ind. 384 (*semble*). See Swasey *v.* Antram, 24 Oh. St. 87.

It is generally held that these statutes do not permit a wife to enter into partnership with her husband. Haas *v.* Shaw, 91 Ind. 384; Bowker *v.* Bradford, 140 Mass. 521, 5 N. E. 480; Artman *v.* Ferguson, 73 Mich. 146, 40 N. W. 907; Payne *v.* Thompson, 44 Oh. St. 192, 5 N. E. 654; Board of Trade *v.* Hayden, 4 Wash. St. 263, 30 Pac. 87; Fuller *v.* McHenry (Wis.), 53 N. W. 896. *Contra, In re* Kinkead, 3 Biss. 405 (*semble*); Francis *v.* Dickel, 68 Ga. 255 (*semble*); Toof *v.* Brewer, (Miss.) 3 So. 571 (*semble*); Suau *v.* Caffe, 122 N. Y. 308, 25 N. E. 488 (Court of Appeals, Second Division: three judges dissenting); but see Hendricks *v.* Isaacs, 117 N. Y. 411, 22 N. E. 1029.

Where a statute expressly empowers a husband and wife to contract with one another they may become partners. Schlapback *v.* Long, 90 Ala. 525, 8 So. 113.

According to the Spanish-Mexican law, a wife may be a partner with her husband. Cosio *v.* De Bernales, Ry. & Moo. 102; Fuller *v.* Ferguson, 26 Cal. 546.

A doubt was suggested in Rittenhouse *v.* Leigh, 57 Miss. 697, as to the right to hold a married woman as partner by estoppel, where the statute gives her power to do business and enter into partnership. Although the statute permits her to engage in business, it might well be held that she could render herself liable only by actually doing so. Where she cannot form a partnership she certainly cannot be charged with the liability of a partner by estoppel. Gwynn *v.* Gwynn, 27 S. C. 525, 4 S. E. 229; Weisiger *v.* Wood, (S. C.) 15 S. E. 597.

If a married woman, not empowered by statute, engages in business as member of a partnership, the capital that she puts into the enterprise is liable for the firm debts, though she is under no individual liability. Weil *v.* Simmons, 66 Mo. 617; Frank *v.* Anderson, 13 Lea, 695, (*semble*). And she has the corresponding right to call for an account. Bitter *v.* Rathman, 61 N. Y. 512. Where a statute permits the partnership to be sued in the firm name this may be done though a married woman is a member; since execution issues in such a suit against firm property only. Yarbrough *v.* Bush, 69 Ala. 170.

In Texas it is held that the husband is the partner. Miller *v.* Marx, 65 Tex. 131; Purdom *v.* Boyd, (Tex.) 17 S. W. 606.

wife inherited an interest in a partnership, and he, instead of having the accounts settled, and the interest withdrawn, as he might do, permitted it to continue in the business, this would make him a partner, even without his actually withdrawing and appropriating funds. It certainly would have this effect wherever the common law so far prevailed that all her share of the profits were at once his. If, however, the property or interest were given to trustees for the sole benefit of the wife, free from any right or control of the husband, then the mere fact of its continuance in the business would not render him liable as partner, although it would probably cast this responsibility on the trustees; as otherwise it would be a kind of limited partnership, without the precautions and safeguards of the law on that subject. And if the law of the State where the case occurred gave to the wife, so far as her property was concerned, the *status* of a single woman, she might then be a partner.

§ 22. **Aliens.** — An alien friend can be a partner in a commercial house; for there is nothing to prevent his holding any personal property, or in bringing and maintaining or defending any suits. (*a*) If the property of the firm were in part or in whole real estate, a question might arise. If the estate was in a country in which aliens could not hold land, the legal title certainly could not be in him; but we think that courts of equity would, in that case, recognize the fact that the partners possess the legal title as trustees for the partnership. They would certainly do this where one of many partners alone holds the title, and there were no aliens; and we see no sufficient reason why they should not, if one or more of the *cestuis que trustent* were aliens. (*b*)

in any way meddled with them. The company's deed of settlement provided, that the husband of a female shareholder should not, merely in respect of his wife's shares, become a member of the company, but that he must first comply with certain conditions. The defendant not having fulfilled these conditions, it was held, that he was not a member against whom a *sci. fa.* to levy execution under Stat. Geo. 4, ch. 46, § 13, could issue. The same was held in Ness *v.* Angas, 3 Exch. 806, where the defendant's wife had bought shares after her marriage, with the consent of her husband, but out of the proceeds of her own estate; and this although her husband had received some of the dividends, signed receipts therefor as her agent, and attended company meetings, at which only shareholders were entitled to be present. It is to be observed, that, in this last case, upon the authority of which Dodgson *v.* Bell was decided, great stress is laid by the judges upon the fact that the remedy attempted to be enforced against the defendant, as a partner by virtue of his wife's interest, was an extraordinary statutable remedy. In both these cases the question was as to who were partners *inter se*, and not as to who were partners with respect to third persons. *In re* Keene's Executors, 3 De G. M. & G. 272.

[See Miller *v.* Marx, 65 Tex. 131.]

(*a*) Co. Litt. 129 b.

(*b*) See *post*, ch. 11.

The rule is quite otherwise as to alien enemies. Here partnership is impossible. (*c*) And if there be a partnership with an alien friend, and war breaks out between the countries, it entirely suspends the partnership. From the language sometimes used, it might be inferred that a war would terminate and annul such partnership altogether; (*d*) and it might have this effect in many cases. But where the terms and business and state of affairs of the partnership were such that an entire suspension of all rights and intercourse during the war would still leave the partnership in a condition to go on as before when the war ended, we should say that the partnership revived by peace, and did not need to be created anew.

No alien enemy can bring any action in any court of the hostile country. (*e*) And this rule has been applied to a citizen then resident in a foreign country, on the ground that if he prevailed, and funds in satisfaction of his judgment were remitted to the foreign country, it would be a strengthening of the enemy. (*f*)

There is nothing to prevent a firm consisting wholly of aliens from having an agency in this country, and bringing any personal actions. Even if husband and wife form a commercial partner-

(*c*) The reason is, that the existence of a state of hostility between two countries renders illegal all commercial intercourse between their citizens. Bristow *v.* Towers, 6 T. R. 35; Potts *v.* Bell, 8 T. R. 548; Willison *v.* Patteson, 7 Taunt. 439; The Hoop, 1 C. Rob. Adm. 196; The Indian Chief, 3 C. Rob. Adm. 22; The Jonge Pieter, 4 C. Rob. Adm. 79; The Franklin, 6 C. Rob. Adm. 127; *Ex parte* Boussmaker, 13 Ves. 71; Griswold *v.* Waddington, 15 Johns. 57, 16 Johns. 438; The Rapid, 8 Cranch, 155; The Julia, 1 C. Rob. Adm. 181; Scholefield *v.* Eichelberger, 7 Pet. 585; The San Jose Indiano, 2 Gall. 268. See upon this subject a learned note to the case of Clemontson *v.* Blessing, 11 Exch. 135.

(*d*) See Griswold *v.* Waddington, 15 Johns. 57; 16 Johns. 438. A commercial partnership between citizens of the respective belligerents was dissolved by the late rebellion. Woods *v.* Wilder, 43 N. Y. 164. But the general doctrine of the text seems to be upheld by the weight of modern authority. Kershaw *v.* Kelsey, 100 Mass. 561; Cohen *v.* N. Y. Life Ins. Co., 50 N. Y. 610. See also Mutual Benefit Life Ins. Co. *v.* Hildyard, 37 N. J. L. 444, where the cases upon the effect of war upon the abrogation of contracts are fully collected. N. Y. Life Ins. Co. *v.* Statham, 93 U. S. 24.

(*e*) Co. Litt. 129 b; Anthon *v.* Fisher, Dougl. 649, note; Brandon *v.* Nesbitt, 6 T. R. 23; Willison *v.* Patteson, 7 Taunt. 439; Griswold *v.* Waddington, 15 Johns. 57; 16 Johns. 438; Hoare *v.* Allen, 2 Dallas, 102. And the disability to sue attaches to an alien carrying on trade in an enemy's country, though he resides there also as consul of a neutral country. His individual character for purposes of trade is not merged in his national character. Albretcht *v.* Sussman, 2 Ves. & B. 323. The wife of an alien enemy is also disabled from suing in her own name on a contract made either before or during coverture. De Wahl *v.* Braune, 1 H. & N. 178.

(*f*) M'Connell *v.* Hector, 3 B. & P. 113; O'Mealey *v.* Wilson, 1 Camp. 482; Roberts *v.* Hardy, 3 M. & S. 533; The Julia, 8 Cranch, 181; Griswold *v.* Waddington, 16 Johns. 438.

ship in a foreign country in which such a partnership could legally exist, it would be difficult to say that they could not maintain an action together in this country, even as joint plaintiffs, however unusual such a thing might be. (*g*)

§ 23. **Insane Persons.** — A fatuous or insane person could neither transact business on his own account nor as a partner. The degree of mental incapacity which should have this effect is hardly capable of definition; and the question whether it existed might be a difficult question of mixed law and fact. So, if one were generally sane, with attacks of insanity, or generally insane, with, lucid intervals, it might be difficult to apply the rule; (*h*) but the rule itself certainly must be that no one is incapacitated from becoming a partner who is able to transact business of his own.

To those under guardianship as spendthrifts or otherwise, or whom habitual intoxication has enfeebled and stultified, a similar rule must apply. (*i*) They are incompetent to transact business on their own account, and therefore incapable of entering into a commercial partnership. (*j*)

§ 24. **Corporations.** — The question has arisen whether a corporation, considered as a person, may become a partner, either with another corporation or with individuals.[1] Perhaps no other general rule on this subject can be stated than that a corporation may incur the liability of a partner as to third persons, although,

(*g*) See ch. 9. [If they have been sued and judgment obtained in the jurisdiction where they do business, the wife's separate property will be held on the judgment in a jurisdiction where husband and wife cannot be partners. Toof *v.* Brewer (Miss.), 3 So. 571.]

(*h*) See the impressive remarks of Lord Chancellor Thurlow, in Attorney-General *v.* Pamther, 3 Bro. Ch. 441.

(*i*) Menkins *v.* Lightner, 18 Ill. 282; Mansfield *v.* Watson, 2 Clarke, 111. So an agreement to form a partnership would clearly be avoided by proof that at the time it was made one of the parties "had not an agreeing mind" through *temporary* intoxication. Pitt *v.* Smith, 3 Camp. 33; Fenton *v.* Holloway, 1 Stark. 126. See Lightfoot *v.* Heron, 3 Younge Exch. 586.

(*j*) See further, on the subject of persons of insufficient mind to contract, 1 Fonbl. Eq. b. 1, ch. 2, § 3; 1 Story Eq. ch. 6, § 229 *et seq.*; 1 Pars. Cont. (5th ed.) b. 1, ch. 20; 2 Pothier on Obligations, App. No. 3, p. 23.

[1] It seems clear that a corporation may be empowered by its charter to form a partnership with an individual. See Butler *v.* American Toy Co., 46 Conn. 136. But where no such power is given by the charter the entrance of a corporation into a partnership is *ultra vires.* Gunn *v.* Central R. R., 74 Ga. 509; Whittenton Mills *v.* Upton, 10 Gray, 582; Hackett *v.* Multnomah Ry., 12 Ore. 124; 6 Pac. 659; Mallory *v.* Hanaur Oil Works, 86 Tenn. 598; 8 S. W. 396.

In Allen *v.* Woonsocket Co., 11 R. I. 288, it was held that a corporation might become partner with an individual where the charter did not specify the business of the corporation; the individual was to have no voice in the partnership business, and all the stock of the corporation was in the hands of a single owner. The case therefore turned on special facts and is of no weight as an authority.

on general principles, it would be inconvenient, if not impossible, for a corporation, which is only a *legal* person, to enter into a full copartnership, either with another *legal* person or with natural persons. (*k*)

§ 25. **Firms.** — [An already existent firm may enter into a partnership with an individual. In such a case the new partnership will commonly be made up of the individual partners of the old firm, together with the new partner. The old firm as such will not generally become a member of the new partnership.[1] But it is possible for two firms (or for a firm and an individual) to enter into a partnership upon such terms that the old firms,

(*k*) As the whole power of a corporation is derived from its charter, it may well be questioned whether it could enter into a partnership for the transaction of a business different from the object for which it was chartered. And it seems that two or more corporations cannot consolidate their funds, or form a partnership, unless authorized by express grant or necessary implication. In Sharon Canal Co. *v.* Fulton Bank, 7 Wend. 412, the court say: "It cannot be necessary to decide whether it is in the power of the two corporations, who are the plaintiffs, to consolidate their stock or to form a partnership. General principles are against the power of corporations to do such acts. They have no powers but such as are granted, and such as are necessarily incident to the grant made to them. Corporations at common law have certain powers, but not such as would authorize the forming of a partnership, or the consolidation of two corporations into one." It is a different question, whether a corporation may not render itself liable to third parties as a *quasi* partner by its acts; and we know of no reason why this might not be the case. The subject was before the court in Holmes *v.* Old Colony R. R. Co., 5 Gray, 58; but as the acts of the corporation were held not sufficient to constitute a partnership liability as to third parties, there was no direct decision upon the question whether a corporation could be held as partner. In Catskill Bank *v.* Gray, 14 Barb. 479, one of the questions presented was whether a corporation could be a partner with an individual even as to liability. The language of the court is: "Strictly, perhaps, corporations should be and are restricted from contracting partnerships with individuals or corporations, and as between the parties to the contract, acting upon equal knowledge, a question of validity might be raised; but a corporation may contract with an individual in furtherance of the object of its creation, the effect of which contract may be to impose upon the company, as respects the community, the liabilities of a partner. I cannot think that a corporation may so shape its contracts, relating to the business for which it was incorporated, as to share jointly with an individual in the profits of such business; subtract its interest in the profits from the fund on which the creditors of the concern had a right to rely for the payment of the debts due to them; and, when called upon by such creditors, be permitted to escape liability altogether, on the ground that the profits were realized as the partner of an individual, which relation the corporation could not legally occupy. I know of no sound reason why a corporation, more than a natural person, who participates in the profits as such of a particular business in which it may lawfully engage, should not be holden to the public for losses." See Marine Bank *v.* Ogden, 29 Ill. 248. [Cleveland Paper Co. *v.* Courier Co., 67 Mich. 152; 34 N. W. 556.]

[1] Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495.

and not their individual members, should be the partners in the new firm.[1]]

§ 26. **The Kinds of Partners.** Different names are given to partners, describing their respective relations to the partnership. The principal names are: 1. Ostensible, or Public. 2. Secret, or Unknown. 3. Nominal. 4. Silent. 5. Dormant. 6. Retiring. 7. Incoming. 8. General. 9. Special.

§ 27. **Ostensible or Public Partners.** — This name indicates that the partner is "shown forth" to the world as one. If this is done with his own consent, all the liability of a partner attaches to him. There is no special way of holding such partner forth. It may be done by having his name in the firm or style of the partnership, or on the signs at the door, or by advertisement, or by circular letters. (*l*) Indeed, if a partner generally unknown is made known as such in any way to any one man, with his own consent, he is, so far as that man is concerned, an ostensible partner in every legal aspect and liability, as much as if advertised to the world. In this sense, therefore, there would be a difference between the words "ostensible" and "public," — the latter meaning shown as a partner to all the world, — although these two words are commonly used as synonymous.[2]

§ 28. **Secret or Unknown Partners.** — He is a secret partner who keeps himself concealed from the public, and from all the customers of the partnership. (*m*) We shall hereafter see that neither the word "Co.," nor any other public designation of a copartnership is necessary to bind all the partners. But this important distinction is to be taken: A partner is liable *either* because he is one in fact, *or* because he holds himself out or suffers himself to be held out as one. In the latter case, he is liable whether actually a partner or not, as we shall presently see. But, in the former case, he is not liable, unless it can be shown that he is actually a partner. If he is, he has gained nothing by being secret. Of course, so long as he is undiscovered he is safe: but as soon as he is found to be a partner, even if this be not until after an action has been brought against the other partners,

(*l*) Partners whose names are not expressed in the firm, but who are simply indicated by the word "Co.," are not dormant, but ostensible, partners. Goddard *v.* Pratt, 16 Pick. 428.

(*m*) United States Bank *v.* Binney, 5 Mason, 185. [Harris *v.* Crary, 67 Tex. 383, 3 S. W. 316.]

[1] *In re* Hamilton, 1 F. R. 800. See also Meador *v.* Hughes, 14 Bush, 652.

[2] In Harris *v.* Crary, 67 Tex. 383, 3 S. W. 316, the term "ostensible partner" is used in the sense of "nominal partner."

he becomes liable; because, although he added no credit to the firm, and permitted no debt to be incurred on his credit, he is equally liable as if he had done this, from the mere fact that he shared the advantages of the partnership.

If a secret partner is announced as a partner to a customer, without his own consent or connivance or ratification, his rights are wholly unaffected by the customer's knowledge, and depend entirely upon the fact of his partnership. Not so, as we have seen in the preceding section, if he permits himself to be made known as a partner to a customer.[1]

§ 29. **Nominal Partners.** — Every ostensible partner is a nominal or known partner; but by this designation is usually meant, that the partner is *only* nominally one. (*n*) That is, he is so held forth as a partner, with his own consent, by any of the means usually employed for that purpose, as to make him liable as a partner on the ground that he has given his credit to the firm, and authorized engagements on his account. (*o*) It follows,

(*n*) *Ex parte* Chuck, 8 Bing. 469. See Currier *v.* Silloway, 1 Allen, 19; Lindsey *v.* Edminston, 25 Ill. 359; Jacobsen *v.* Hennekenius, 1 Bro. P. C. 432; Fox *v.* Clifton, 6 Bing. 795; Hicks *v.* Cram, 17 Vt. 449. Hence one who is merely a nominal partner with another man may be called by him as witness. He is not incompetent on the score of interest. Parsons *v.* Crosby, 5 Esp. 199; Mawman *v.* Gillett, 2 Taunt. 327.

(*o*) The ground of the liability of a nominal partner is thus stated in a leading case, Waugh *v.* Carver, 2 H. Bl. 235: "A case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money, and, to go still farther, not to receive any profits. But, if he will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." So in *Ex parte* Watson, 19 Ves. 461, Lord Eldon says: "There is a wide difference between a dormant and nominal partner. The former is liable in respect of the profits; . . . but if one, retiring or coming into the trade, suffers his name to be used, it is of no consequence whether he has a salary or sum of money, to be paid by others, or to be got out of the profits. It is the use of the name that makes him liable, as one of the persons by and to whom everything is bought and sold." So, in Hicks *v.* Cram, 17 Vt. 449, the court say; "It is the representing one's self, or suffering one's self to be represented, as a partner, that creates a liability to third persons; and this is sufficient to create a liability, notwithstanding the truth should prove to be, that the person so suffering himself to be held out as partner, in fact was not so. This is in order to preserve good faith and prevent fraud, and is almost the only ground of an estoppel *in pais*. If one man has made a representation which he expects another may or will act upon, and the other does in fact act upon it, he is estopped to deny the truth of the representation. So, too, equally, when one remains silent, and suffers another to make the representation."

[1] Milmo Nat. Bank *v.* Carter (Tex.), 20 S. W. 836.

therefore, that if a person suffers himself to be regarded as a partner by any customer of the firm, to him he is liable as if he were one, although he is in fact no partner, and not generally supposed to be one. The nominal partner is the converse of the secret partner.

§ 30. **Silent Partners.** — This name is properly and generally applied to those who take no active part whatever in the business of the firm, and exercise none of the rights of a partner, except that of receiving their share of the profits from time to time. He is a silent partner, whether his name be made known in any way as a partner or not. There is, however, a very common use of the word "silent," which differs somewhat from that above stated. It seems to be thought that he only is a silent partner who is silent to the world in respect to his interest in the firm, as well as silent within the firm in its transaction of business. In this sense, a silent partner is one who is both inactive and unknown. And there are those who go so far as to think the silence to the world to be the main thing, understanding by the phrase "silent partner" one who is not known as such, whether active or otherwise; thus making the word "silent" synonymous with the word "secret." But the definition first above given is the most reasonable, and is best sustained.

§ 31. **Dormant Partners.** — This phrase also is used in somewhat different senses. Indeed, there is much confusion and inaccuracy in the common use of the three words, — "secret," "silent," and "dormant." Many use this word as if it meant only unknown and secret; and apply the designation of dormant or sleeping to partners whose names are concealed, however awake and active they may be in the business of the firm. Others consider the word as properly applied to those only who are wholly inactive in the business, whether known to have an interest or not. We think, however, the word implies both the qualities of secrecy and inactivity. (*p*) It seems to be most

(*p*) These two qualities are attributed to the dormant partner in the following expression of the difference between a dormant and an open partnership. "It seems to me to be this: where the names of the partners do or do not appear in their accounts, their advertisements, or their paper, — where the business is carried on in the name of all, it is open; but, *if any are kept back*, it is *dormant;* that the knowledge which the public may have is not the test, when it is acquired from the declarations of the acting, avowed partners: it may enable them to reach the dormant one, if the transaction is one in which he had an interest, but does not alter its nature. The partnership remains dormant as to all whose names do not appear on its transactions. The *dormant*, the *sleeping*, *inactive* partner may be known by reputation, or the declaration of his copartner; but these do not make him an avowed or active one, without the avowal and pledge of his name or paper." Per

common and most convenient to use the word as indicating a partner who both keeps himself concealed, and who also refrains from any active interference with the business or management of the firm. But the word is so often used as merely synonymous with "unknown," that we shall frequently be obliged to employ it or refer to it in this sense.

§ 32. **Retiring Partner.** — He is one who leaves an existing firm. In law, as we shall see, the going out of a partner, by his own act, or decree of court, or by death, terminates that partnership. But in practice it is otherwise. Some old firms have continued to use the same style, and to transact their business as one and the same copartnership, with all the continuity of a corporation, although not only all the original members, but all who immediately succeeded them, have passed away. In some of the commercial cities of Europe, there are said to be active firms established under their present names by the great grandfathers of those who are now members. In this country it is, however, more common to announce these changes by a corresponding change in the style of the firm.

§ 33. **Incoming Partner.** — This phrase designates a person who enters into an existing copartnership, and becomes a member of it. Here it may be said, as before, that any such change as the addition of a new member terminates the former copartnership in law and creates a new one. (*pp*) But in practice it is not so; the

Baldwin, J., in Winship *v.* Bank of the United States, 5 Pet. 573. In Mitchell *v.* Dall, 2 H. & G. 159, however, and Bank of St. Mary's *v.* St. John, 25 Ala. 566, persons seem to have been held dormant partners, who, though their names were concealed, took an active part in the business of the firm. See Lloyd *v.* Archbowle, 2 Taunt. 324; Kelly *v.* Hurlburt, 5 Cowen, 534; Hoare *v.* Dawes, 1 Doug. 371; *Ex parte* Watson, 19 Ves. 461; Shropshire *v.* Shepherd, 3 Ala. 733. The definition and illustration of dormant partnership in Watson on Partnership, p. 46, seems accurate: "Sometimes all the partners in trade do not appear ostensibly to the world, though they share in the profits and loss; and it is not unusual for gentlemen of large and independent fortunes to embark very considerable sums of money in trade, they being oftentimes ignorant of the *science* of commerce, and meaning to depend entirely upon the skill of merchants or traders with whom they engage in a general partnership of all their stock and effects, yet not suffering their names to appear in the copartnership firm, but at the same time receiving a proportionate share of the profits arising out of their joint trade, bearing equally their risk of loss; and such are usually styled dormant partners." See North *v.* Bloss, 30 N. Y. 374; Waite *v.* Dodges, 34 Vt. 181. [That a dormant partner must be both concealed and inactive, see Elmira Iron & Steel R. M. Co. *v.* Harris, 124 N. Y. 280, 26 N. E. 541; compare Metcalf *v.* Officer, 2 F. R. 640. Where the firm name does not contain the name of partners, none of the partners seem to be dormant: since credit is given, not to known partners, but to all who in fact are interested. Clark *v.* Fletcher, 96 Pa. 416.]

(*pp*) Mudd *v.* Bast, 34 Mo. 465. When two partners enter into another partnership with a third person they are

old firm being "kept up," as the common phrase is, by former members going out from time to time, and new members coming in.

§ 34. **General Partner.** — This is a new phrase with us, and is, at least in our sense of it, unknown in the English law. It means one who is that member of a Limited Partnership, under our statutes, who transacts the business, whose name is used in the firm, and who is liable for all the debts and obligations of the firm, to their full amount.

§ 35. **Special Partner.** — He is one who supplies a certain amount of capital, and who, if he complies with all the requirements of the statutes, is not liable for the debts of the firm beyond the amount which he contributes to the capital.

§ 36. **Sub-Partner.** — [Sub-partner is the name often given to one with whom a partner shares his profits by agreement.[1] Since, however, such a person is neither in fact a partner nor is he held liable as a partner, the term sub-partner is misleading and not to be commended.]

We have been somewhat precise in defining these different classes or kinds of partners, because it will be seen in our subsequent chapters that especial rights, obligations, liabilities, and remedies belong to them severally.

in the new partnership as individuals, and the profits are to be divided equally amongst the three. Warner *v.* Smith, 9 Jur. N. S. 168.

[1] Nirdlinger *v.* Bernheimer, 133 N. Y. 45; 30 N. E. 561.

CHAPTER IV.

OF THE PURPOSES AND KINDS OF PARTNERSHIP.

§ 37. **Purposes for which Partnerships may be formed.**—Although partnerships are usually formed for commercial purposes, they are not always so, and there is scarcely any occupation which an individual can legally pursue that may not be the subject of partnership. In this country we have a far wider extent in the variety of purposes for which partnerships are established, than anywhere else. Thus, we have partnerships not only for every known branch of commercial business, but for all kinds of farming, (*a*) or manufacturing, mining, (*b*)[1] stage-driving, fishing, hunting,

(*a*) See opinion of Gould, J., in Coope *v.* Eyre, 1 H. Bl. 37; Allen *v.* Davis, 13 Ark. 28; Lansdale *v.* Brashear, 3 T. B. Mon. 330; Quine *v.* Quine, 9 Smedes & M. 155; Roach *v.* Perry, 16 Ill. 37. Jointly buying and selling cattle may constitute a trading partnership. Smith *v.* Collins, 115 Mass. 388.

(*b*) In England mines have never been regarded in equity as real estate, but uniformly as the regular subject and substratum of a trade. In Williams *v.* Attenborough, Turn. & Russ. 70, the language of the Lord Chancellor is: "Collieries and landed estates are quite different in the contemplation of this court; a colliery being always considered as a trade, the profits accruing from day to day as in all trading concerns." Story *v.* Ld. Winsor, 2 Atk. 630; Wren *v.* Kirton, 8 Ves. 502; Crawshay *v.* Maule, 1 Swanst. 495, 518; Fereday *v.* Wightwick, Tamlyn, 250; Jeffreys *v.* Smith, 1 Jac. & W. 298. See Beatty *v.* Bates, 4 Y. & C. Exch. 182; Roberts *v.* Everhardt, 1 Kay, 148. The whole subject of partnership in mines, as treated in the English courts, is considered in a separate chapter in Collyer on Part. b. 5, ch. 2.

[1] A mining partnership is created when the owners of a mine operate it for their joint benefit. Manville *v.* Parks, 7 Col. 128; Meagher *v.* Reed, 14 Col. 335, 24 Pac. 681; Snyder *v.* Burnham, 77 Mo. 52.

Mining partners own the mine in common; and therefore in case of an action against the partnership only the shares of those partners who were served with process can be sold on execution. Santa Clara Mining Assoc. *v.* Quicksilver Mining Co., 17 F. R. 657, 8 Sawy. 330.

There is no *delectus personarum;* therefore a partner may convey his share in the mine without the consent of his copartners, and the assignee becomes a partner. Nisbet *v.* Nash, 52 Cal. 540; Meagher *v.* Reed, 14 Col. 335, 24 Pac. 681. And the partnership is not dissolved by the death or bankruptcy of a partner, or by assignment of a partner's interest to a stranger. Kahn *v.* Central Smelting Co., 102 U. S. 641; Lamar *v.* Hale, 79 Va. 147. There is no fiduciary relation between the partners; one partner may therefore buy up the share of another, and hold it against his copartners. Bissell *v.* Foss, 114 U. S. 252.

A mining partnership imposes on the partners the liabilities of a true partnership, so that each is liable for the entire amount on all firm contracts. Stuart *v.* Adams, 89

lumbering, and the like, as well as the business of lawyers, (*c*) physicians, (*d*) mechanics, artists, laborers, and, indeed, for almost all other employments. (*e*)

§ 38. **Partnerships to deal in Land.** — After some question, it seems to be settled, that there may be a partnership for the buying and selling of land. (*f*) It is to be remembered, however, that the Statute of Frauds, and our Statutes of Conveyance, which require that all interests in land should be transferred by a writing signed and sealed by the grantor, and acknowledged and recorded, thus determine the legal title by different evidence and on different principles from those which apply to personalty. This has sometimes an important effect upon the rights and obligations of partners in land speculations, and of those who deal with them. We have already alluded to this subject, and shall consider it hereafter. (*g*)

(*c*) Marsh *v.* Gold, 2 Pick. 286; Westerlo *v.* Evertson, 1 Wend. 532; Warner *v.* Griswold, 8 Wend. 665; Livingston *v.* Cox, 6 Barr, 360; Smith *v.* Hill, 13 Ark. 173. See Jones *v.* Caperton, 15 La. Ann. 475.

(*d*) Allen *v.* Blanchard, 9 Cow. 631; Thompson *v.* Howard, 2 Ind. 245.

(*e*) Thus, there may be a partnership in a ferry. Bowyer *v.* Anderson, 2 Leigh, 550. An association for carrying personal property for hire in vessels is a commercial partnership by the laws of Louisiana. Hefferman *v.* Brenham, 1 La. Ann. 146. Ship agents and ship brokers may be in partnership as to the profits of their respective commissions. Waugh *v.* Carver, 2 H. Bl. 235. See Bovill *v.* Hammond, 9 D. & R. 186; Cheap *v.* Cramond, 4 B. & A. 663. Private associations and clubs for benevolent and other purposes have been regarded so far as partnerships that their members are subject to liabilities similar to those of partners. Beaumont *v.* Meredith, 3 Ves. & B. 180. See Delauney *v.* Strickland, 2 Stark. 416. But their liability seems to rest on the authority given to the agents rather than on partnership. The points of difference between such associations and trading partnerships are stated and illustrated in Flemyng *v.* Hector, 2 M. & W. 172. See *post*, § 60.

(*f*) Lands being now so far subject to commercial conditions, by the aid of equity, as to be capable of being held as incident to commercial partnerships, there would seem to be no sufficient reason why they may not, on the same principles, and by the same equitable conversion, be the substratum itself of a copartnership. The later cases, both in England and in this country, leave little or rather no room for doubt upon this point. Dale *v.* Hamilton, 5 Hare, 369; Potts *v.* Waugh, 4 Mass. 424; Fall River Wh. Co. *v.* Borden, 10 Cush. 458; Smith *v.* Burnham, 3 Sumn. 435; Kramer *v.* Arthurs, 7 Barr, 165; Brady *v.* Calhoun, 1 P. & W. 140; Olcott *v.* Wing, 4 McLean, 15; Smith *v.* Jones, 12 Me. 332; Dudley *v.* Littlefield, 21 Me. 418; *In re* Warren, Davies, 320; Ludlow *v.* Cooper, 4 Oh. St. 1; Chester *v.* Dickenson, 54 N. Y. 1. See Patterson *v.* Brewster, 4 Edw. Ch. 352; Claggett *v.* Kilbourne, 1 Black, 346. [Corey *v.* Cadwell, 86 Mich. 570; 49 N. W. 611; Yeoman *v.* Lasley, 40 Oh. St. 190; Hulett *v.* Fairbanks, 40 Oh. St. 233; Canada *v.* Barksdale, 76 Va. 899. See *post*, § 67.]

(*g*) See *ante*, § 6, and *post*, ch. 12.

Cal. 367, 26 Pac. 970. But since it is a non-trading partnership, one partner has no authority to bind the firm by a firm note. See *post*, § 85.

The owners of a mine may of course, if they choose, form an ordinary partnership for the purpose of carrying on the mine by entering into a partnership agreement. Quinn *v.* Quinn, 81 Cal. 14, 22 Pac. 264; Randall *v.* Meredith (Tex.), 11 S. W. 170.

§ 39. **Exercise of an Office.** — It is obvious that there can be no partnership in a mere personal office, or in the discharge of its duties; as in the office of guardian, trustee, executor, or the like. (*h*) These offices are often held by two or more persons together; but their powers and duties, and relations generally, are governed by rules entirely distinct from those of partnership.

There are additional and decisive reasons against the exercise of the powers or the discharge of the duties of any public office by a partnership. It might seem as if there were some offices, as that of postmasters, or of examiners of steamboats, or the like, which might be given to a firm; but the principle of personal selection and personal responsibility make it difficult, if not impossible, that a firm should hold such an appointment, although persons holding it sometimes become partners, and share in the profits of the appointment. (*i*)

§ 40. **Kinds of Partnership.** — Partnerships may be general or special. In theory, it is said they may be universal; but an instance can seldom occur in which the partners own everything in common, without the reservation of any private and exclusive property of either of them. (*j*) We have, however, in this country,

(*h*) Thus, the office of sheriff's bailiff is personal, and cannot be held by two in partnership. Jons *v.* Perchard, 2 Esp. 507. See Canfield *v.* Hard, 6 Conn. 180. Upon the same principle a mercantile partnership, though it may act as executor, cannot be appointed guardian. De Mazar *v.* Pybus, 4 Ves. 644. Where, by the usage of the herald's office, a herald and pursuivant were always in attendance, who shared the profits of any business which was begun while they were jointly on duty, it was held that they were in the situation of copartners, and might maintain a joint action (for making out a pedigree) against the defendant, though he had contracted only with the herald. Townsend *v.* Neall, 2 Camp. 190. On the other hand, the appointment of one of a firm to the office of sheriff's replevin clerk will not enable the firm to bring a joint action for the expenses of preparing a replevin bond, although it was executed, and the stamp for it provided, in their office. Brandon *v.* Hubbard, 4 J. B. Moore, 367. See Clarke *v.* Richards, 1 Y. & C. Exch. 351. A., an attorney holding numerous lucrative clerkships, stewardships, and other offices, entered into copartnership with B. By the articles of agreement it was stipulated that B. should be a partner with A. in his business, and "that the emoluments arising from the said offices, clerkships, and stewardships as should be held by either of them, the said A. and B., during the partnership, should be considered as partnership property, and be distributable accordingly." It was held that the above contract was not void as being an agreement for the sale of an office, either within the 5 & 6 Edw. 6, ch. 16, or within the 49 Geo. 3, ch. 126. Sterry *v.* Clifton, 9 C. B. 110.

(*i*) See Caldwell *v.* Lieber, 7 Paige, 483.

(*j*) United States Bank *v.* Binney, 5 Mason, 183. Story, J., said: "There is probably no such thing as a universal partnership, if by the terms we are to understand that everything done, bought, or sold is to be deemed on partnership account. Most men own some real or personal estate which they manage exclusively for themselves." [The so-called "partnership" between husband and wife, according to the Spanish-Mexican law, is however a universal partnership. Fuller *v.* Ferguson, 26 Cal. 546.]

some associations which might perhaps be regarded as universal partnerships. (*k*) Special partnerships relate only to an ownership or use or employment by partners of one thing, or one cargo, or one mercantile adventure. (*l*) It has been said that if a note

(*k*) The case of Goesele *v.* Bimeler, 14 How. 589, would seem to establish, not only that such a partnership may exist, but that, under able administration and conduct, it is not inconsistent with a high degree of individual social prosperity. The defendants in the case were members of a society called Separatists, which emigrated from Germany to the United States in 1817, and settled in Ohio. In 1819, articles of association were drawn up and signed by the members of the society, consisting of fifty-three males and one hundred and four females. By these articles, the signers surrendered all their individual property, real or personal, present or future, into the hands of three directors, elected annually by themselves. These officers were to conduct the business of the society, to manage all its property, and to account to the society for all their transactions. In 1824, the original articles were amended. An entire union of property, and an absolute renunciation of private ownership, were declared. Provisions were made for the admission of new members. The directors were to conduct the affairs of the society; to apply themselves for its benefit; to provide for the boarding, lodging, and clothing of its members; to provide for the children; to determine disputes, &c. Other of the new provisions related to the general welfare of the society. In 1832, a charter of incorporation was granted them, in accordance with which they adopted a constitution, embodying, with others, substantially the same provisions as those contained in the articles of association above referred to. The extent of the prosperity, which, under this modified species of communism, the association had attained in the space of about thirty years, may be seen in the following extracts from the opinion of Mr. Justice McLean: "It appears, by great industry, economy, good management, and energy, the settlement at Zoar has prospered more than any part of the surrounding county. It surpasses probably all other neighborhoods in the State in the neatness and productiveness of its agriculture, in the mechanic arts, in manufacturing by machinery. The value of the property is now estimated by complainants' counsel to be more than a million of dollars." Further: "The people . . . are proved to be moral and religious. It is said, that, although the society has lived at Zoar for more than thirty years, no criminal prosecution has been instituted against any one of its members." There is no legal objection, it seems, to such an association. See an example of a similar association called "The Harmony Society." Baker *v.* Nachtrieb, 19 How. 126. See Lyman *v.* Lyman, 2 Paine C. C. 11. [Hamilton *v.* Halpin, 68 Miss. 99, 8 So. 739. In Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, several capitalists associated for the purpose of controlling the operations of various railroads and entering into other enterprises. This was regarded as a partnership.]

(*l*) The authority which is usually referred to for the distinction between general and special partnerships is a *dictum* of Lord Mansfield in Willett *v.* Chambers, Cowp. 814. "Let us see, then," said he, "what was the nature of the partnership afterwards entered into between Dodley and the present defendant: whether it was a general partnership in all Dodley's business, or confined to one particular branch of it only; for, to be sure, there may be such a confined partnership." Very many cases have since recognized and illustrated the distinction. Salmons *v.* Nissens, 2 T. R. 674; Robey *v.* Howard, 2 Stark. 557; Holmes *v.* Higgins, 1 B. & C. 74; De Berkom *v.* Smith, 1 Esp. 29; Livingston *v.* Roosevelt, 4 Johns. 265, 270; Post *v.* Kimberly, 9 Johns. 470; Mumford *v.* Nicoll, 20 Johns. 611; Ensign *v.* Wands, 1 Johns. Cas. 171; Reynolds *v.* Cleveland, 4 Cow. 282; Cumpston *v.* McNair, 1 Wend. 457; Mifflin *v.* Smith, 17 S. & R. 165; Bentley *v.* White, 3 B. Mon. 263; Benson *v.* McBee, 2 McMull. 91; Solomon *v.* Solomon, 2 Kelly, 18; Ripley *v.* Colby, 23 N. H. 438; Petripin *v.* Collier, 1 Barr, 247.

or bill of exchange be signed or indorsed by two or more persons jointly, this is a case of special partnership between those persons as to that note or bill. (*m*) The name, however, or the distinction, is of little use, for all the laws of partnership apply as far, and only as far, as the partnership extends; and there is no distinct dividing line between general partnerships and those which have been called special. And the designation, by statute, of the partner in a limited partnership, who is liable only to the extent of the capital he supplies, as "special partner," is an additional reason for the disuse of the phrase "special partnership," in the sense above stated.

Joint-stock companies will be treated by themselves. They are much used in England, and are there regulated by statute. Here they were quite common formerly. But incorporation may here be obtained with great facility for any legitimate purpose; and wise and practical laws, in many of our States, give to corporations all the freedom and all the facilities they can desire, and limit the responsibility of members as narrowly as a due regard for public safety, and, indeed, the safety of the members, permits; and joint-stock companies are now comparatively rare.

Limited partnerships, to which we have already alluded, we shall speak of more fully in a subsequent chapter. (*n*)

(*m*) Gow on Part. 6; 3 Kent (8th ed.), p. 28. The only authority for considering such joint promise or indorsement as constituting a partnership is the case of Carvick *v.* Vickery, 3 Doug. 653, note. There the action was by the indorsee of a bill of exchange drawn upon defendants, the Maydwells, by father and son, and payable "*to us or our order*," but indorsed only by the son. The father and son were admitted not to be partners. At the first trial Ld. Mansfield nonsuited the plaintiff, because the bill had not been indorsed by both the parties to whose order it was payable. But a rule being obtained to show why there should not be a new trial, the court were unanimously of opinion that the Maydwells, by making the bill payable "*to our order*," had made themselves partners as to this transaction, and the rule was made absolute. Upon the second trial, before Ld. Mansfield, a verdict was again found for the defendants on the same ground, that the indorsement should have been made by both parties to whom the bill was payable. This verdict does not appear to have been disturbed. So that, the result of the case being considered, it can hardly be said to be authority for the position that joint promisors or joint indorsers of a bill or note are *quoad hoc* partners; since the second verdict could only have been upheld on the ground that the defendants were not partners. The case does not seem to rest on sound principles, and is unsupported by any other English authorities. In this country, it has been distinctly repudiated. In Willis *v.* Green, 5 Hill, 232, Nelson, C. J., says: "It was once supposed, in a like case, that the indorsers were partners *quoad* the particular transaction; but that doctrine was repudiated when the case afterwards came on for trial before Lord Mansfield." Sayre *v.* Herick, 7 W. & S. 383; Hopkins *v.* Smith, 11 Johns. 161; Shepard *v.* Hawley, 1 Conn. 367. See Mifflin *v.* Smith, 17 S. & R. 165.

(*n*) See *post*, ch. 17.

CHAPTER V.

WHO ARE PARTNERS.

§ 41. **The Test of Partnership.** — There is ordinarily no difficulty in establishing the existence of a partnership. The relation of the parties is usually fixed by a written agreement, known as "articles of co-partnership," which in almost every case provides at the outset for the formation of a partnership, and declares the parties to be partners. But in some cases an agreement, either oral or written, is entered into by the parties concerned, which does not profess to create a partnership, yet it is contended that the effect of the agreement is to create one. A question of much difficulty is then presented, namely; whether the agreement, the terms of which are known, does in fact create that sort of relation between the parties which the law considers a partnership.

§ 42. **Former doctrine in England. Sharing Profits.** — Upon this point the view held by the English courts has within a few years undergone a remarkable change. Up to the year 1860, it appeared to be the law of England that the mere fact of participation in the profits of a business as such, made one a partner as a matter of law. This was combined with the doctrine that though such a partnership existed as to third persons, a different rule must be applied to determine whether persons were partners *inter se*.[1]

[1] The general doctrine appears to have been founded upon the language of De Grey, C. J., in Grace *v.* Smith, 2 W. Bl. 998. There Smith & Robinson dissolved partnership. But, Robinson continuing the business, Smith left behind in the trade 4,000*l.*, for which he was to receive five per cent. interest, and an annuity of 300*l.* a year. The question being whether Smith & Robinson were general partners, De Grey, C. J., said: "Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profits, he takes part of that fund on which the creditor of the trader relies for his payment . . . I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment." — In Waugh *v.* Carver, 2 H. Bl. 235, the distinction between partners *inter se* and partners as to third persons was first put forward. The question was, whether the defendants, the two Carvers and Giesler, were liable as partners upon the true construction of certain articles of agreement. The material portions of their contract were these: The two Carvers, merchants and ship agents, residing in Gosport, agreed with Giesler, also a merchant and ship agent, that, for their mutual benefit, he should establish himself at Cowes, and there

This rule was however, confined to the case of participation in the *net profits* of a business; one who had a share in the *gross*

carry on a house in the agency line. The two Carvers were to recommend ships to Giesler, and were to receive a share in his commissions on such ships, and in the discount of the bills of the tradesmen employed on them. Giesler was to act by the advice of the Carvers, to recommend ships to them, and to receive a share in their commissions on them, and in their discounts on tradesmen's bills, and also certain proportions of warehouse rent and agency. Eyre, C. J., said: "It is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not, nor ever meant to be partners . . . But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of Grace *v.* Smith, he who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." Waugh *v.* Carver was followed by later cases: Hesketh *v.* Blanchard, 4 East, 144 (*semble*); Cheap *v.* Cramond, 4 B. & Ald. 663; Barry *v.* Nesham, 3 C. B. 641; Heyhoe *v.* Burge, 9 C. B. 431.

The distinction between profits as such and a sum equal to profits appears to have been introduced by Lord Eldon, who however professed to follow authority. In *Ex parte* Hamper, 17 Ves. 404, the facts were that Thomas & Rogers had been partners in a mercantile adventure to Cadiz, Rogers furnishing goods, and Thomas going out with and selling them. Before the goods were all sold, Rogers entered into a new arrangement with Thomas, as follows: "I do agree to give Thomas one-half the profits he makes on my goods instead of a commission, after shipping, freight, and every expense paid; I pay Thomas his passage out." This agreement was acted upon by the parties, and letters were in evidence from Thomas to Rogers, in which Thomas styled himself a partner, and other expressions indicating the existence of a partnership between Rogers and himself.

Lord Eldon said: "The cases have gone to this nicety, upon a distinction so thin that I cannot state it as established upon due consideration, that, if a trader agrees to pay another person, for his labor in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner." Afterwards, in the same case, as if in explanation, and certainly in confirmation, of this, he says: "It is clearly settled, though I regret it, that if a man stipulates that, as the reward of his labor, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner." In *Ex parte* Rowlandson, 1 Rose, 91, he says, more briefly, but evidently intending to express the same rule: "The ground is settled, that, if a man, as a reward for his labor, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner." See to the same effect *Ex parte* Langdale, 18 Ves. 300; *Ex parte* Watson, 19 Ves. 459; *Ex parte* Hodgkinson, 19 Ves. 291; *In re* Colbeck, Buck, 48.

This declaration has had great influence upon the courts and the profession. Collyer says, "It must be admitted that his lordship's *dicta* upon this subject have received the sanction of the most eminent practitioners at the bar." Collyer on Partnership (Perkins's ed.) § 40. Nor is it difficult to account for this. For, to say nothing of

profits of a business, so called, that is, the gross earnings of the business, was not held as a partner even as to third persons.[1]

§ 43. **Cox v. Hickman.** — The earlier authorities, while not directly overruled, were rendered obsolete by the decision of the House of Lords in the case of Cox *v.* Hickman.[2] In that case the creditors of an insolvent manufacturer agreed to carry on the business of the debtor, and to apply the net profits to the payment of the debts. This agreement was held by the House of Lords not to constitute the creditors partners even as to third persons. Lord Cranworth said: "It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting on his behalf." Lord Wensleydale said: "The law as to partnership is undoubtedly a branch of the law of principal and agent."

This case, decided in the highest court of England, was at once the end of the old theory of partnership, and the starting-point of a new doctrine. It put an end to two notions which had been regarded as fundamental; first, that third persons may hold to the liability of partners those who in fact are not partners, merely because some other relation exists between them; second, that participation in the profits of a business is conclusive of a partnership. The case did not however offer any alternative test of a partnership; for the suggestion of the necessity of an agency is of no assistance in a doubtful case. The agency is the result of the partnership, not *vice versa*.[3]

It was at first doubtful whether the case of Cox *v.* Hickman was an illustration of a general principle, or was decided simply

the immense authority of so eminent a judge, his words so understood supply a clear, simple, and easily applicable rule for the avoidance of a great danger. They tell the lawyer who would draw a contract of this kind, how, by a mere formula, he can guard his clients from a great uncertainty; the inconvenience of which might otherwise suffice to prevent the proposed arrangement. As a convenient rule, much may be said of it; but, as an accurate one, it must be spoken of very differently.

[1] Dry *v.* Boswell, 1 Camp. 329. See Cheap *v.* Cramond, 4 B. & Ald. 663; Pott *v.* Eyton, 3 C. B. 32; Lyon *v.* Knowles, 3 B. & S. 556.

[2] 8 H. L. C. 268 (1860).

[3] Cleasby, B., in Holme *v.* Hammond, L. R. 7 Ex. 218, 233.

on the facts, and of no general application. It was finally determined that the former is true.[1]

§ 44. **Sharing Profit and Loss.** — The conclusiveness of a sharing of profits as a test of partnership has therefore been definitively denied. In its place, however, the theory was put forward by high authority that a sharing of profit and loss was necessarily conclusive of a partnership.[2] But this theory is not now law in England. It has been finally held that although profit and loss are shared the parties are not partners if their intention was not to form a partnership relation.[3]

§ 45. **Bovill's Act.** — Meanwhile the legislature had attempted to remove the difficulties of this branch of the law of partnership by statute, by the passage of "Bovill's Act," 28 and 29 Vict. ch. 86.[4] It would seem, however, that nothing was gained by the act:

[1] Bullen *v.* Sharp, L. R. 1 C. P. 86 (Exch. Chamb.); Mollwo *v.* Court of Wards, L. R. 4 P. C. 419. In the former case Bramwell, B., said, as to the distinction sometimes made between partnership *inter se* and as to third persons: "The burden of proof . . . is on the plaintiffs. Now, what reason do they give? They say that the defendant is a partner with his son; and that, if not partners *inter se*, they are so as regards third parties. A most remarkable expression! Partnership means a relation between two parties. How, then, can it be correct to say that A and B are not in partnership as between themselves; they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean *inter se*; for partnership is a relation *inter se*, and the word cannot be used except to signify that relation. A is not the agent of B; B has never held him out as such; yet C is entitled, as between himself and B, to say that A is the agent of B. Why is he so entitled, if the fact is not so, and B has not so represented?"

[2] Lindley Part. * 10; Pawsey *v.* Armstrong, 18 Ch. D. 698.

[3] Walker *v.* Hirsch, 27 Ch. D. 460 (C. A.); Badeley *v.* Consolidated Bank, 38 Ch. D. 238 (C. A.).

[4] By this Act, after reciting that it is expedient to amend the law relating to partnership, it is therefore enacted as follows: 1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such. 2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner. 3. No person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader. 4. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business. 5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20*s.* in the pound, or dying in insol-

for the common law has since that time been declared to be in accordance with the provisions of the act, and courts of the highest authority have said that it added nothing to the law.[1]

§ 46. **Present English Doctrine.** — The result of the English cases seems to be the abandonment of any artificial test of partnership, and the adoption of what must be regarded as the true principle: that parties become partners only by agreeing to enter into an association which the law regards as a partnership.[2] The agreement, either express or implied, to form such an association, is the only method by which one can become a true partner. Whether such an association is intended to be formed is a question of fact in each case; and in deciding this question one obtains much assistance from the opinion of Jessel, M. R., in Pooley *v.* Driver:[3] "Partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others so as to bind the others; he acts on behalf of the firm of which they are members; and as he binds the firm and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity."

The formation of a partnership, then, is the creation of a body,

vent circumstances, — the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a good-will as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied. 6. In the construction of this Act the word "person" shall include a partnership firm, a joint-stock company, and a corporation.

[1] Sir Montague Smith in Mollwo *v.* Court of Wards, L. R. 4 P. C. 419; Jessel, M. R., in Pooley *v.* Driver, 5 Ch. D. 458.

[2] Badeley *v.* Consolidated Bank, 38 Ch. D. 238.

[3] 5 Ch. D. 458, 476.

existent apart from the partners, for business purposes; for which the partners are to act, and not directly for each other.

§ 47. **American Doctrine not Uniform.** — The rules adopted upon this subject by the American courts are, as we might expect, not harmonious. In the older States the rule laid down in Waugh *v.* Carver was followed before a more reasonable rule was made possible by the decision of Cox *v.* Hickman. The courts of some of these States felt themselves constrained by authority not to follow the later English decision, even though the rules laid down in it were more consonant with true principle. In other States, however, the true principles were recognized even before they were formulated in England. All that is now possible, therefore, is to examine in detail the rules laid down in the different jurisdictions in this country; bearing in mind, throughout this examination, the fact that the rules finally adopted by the English courts are the only ones consistent with principle.

§ 48. **Partnership inter se and as to Third Persons.** — It is said in a number of recent cases that there may be a partnership as to third persons, though the parties are not partners *inter se.*[1] It has however been held, in several important and well-reasoned cases, that there can be no partnership except one founded upon the intention of the parties.[2] Indeed, it seems to be the view of a respectable author that the distinction between partnership *inter se* and partnership as to third parties has been abandoned in this country;[3] but unfortunately it appears, from the authorities already cited, that the indefensible distinction still exists in many if not in most jurisdictions. No stronger argument need be made against it than that of Bramwell, B., previously quoted.[4]

§ 49. **Sharing Profits as such.** — The rule generally followed in the earlier American cases was that suggested in some of the English cases: that where the party in question received from a business a sum equal to a certain proportion of the profits he was not a partner; but if he received a proportional part of the profits themselves, he was a partner. In a less crude form, the rule came to be stated thus: that when the party has a proprietary

[1] Powell *v.* Moore, 79 Ga. 524, 4 S. E. 383; Howe *v.* Dupoyster (Ky.), 7 S. W. 627; Waring *v.* Nat. Marine Bank, 74 Md. 278, 22 Atl. 140; Pratt *v.* Langdon, 97 Mass. 97; Hackett *v.* Stanley, 115 N. Y. 625, 22 N. E. 745; Caldwell *v.* Miller, 127 Pa. 442, 17 Atl. 983; Miller *v.* Marx, 65 Tex. 131.

[2] Haycock *v.* Williams, 54 Ark. 384, 16 S. W. 3 (*semble*); Eastman *v.* Clark, 53 N. H. 276; Harvey *v.* Childs, 28 Oh. St. 319; Boston & Col. Smelting Co. *v.* Smith, 13 R. I. 27.

[3] 1 Bates Part. § 15.

[4] *Ante,* § 43.

interest in the profits *qua* profits before division he is a partner, otherwise not.[1]

§ 50. **Distinction between Gross and Net Profits.** — The distinction between gross profits and net profits has been pointed out by some American cases,[2] following the English case of Dry *v.* Boswell,[3] already examined.

[1] "The rule is easily laid down; the difficulty is in its application. Where a part *of the profits themselves is the property* of the party he is then a partner. Where their amount merely ascertains the amount of a debt or duty, but they themselves do not belong to the party, there it is not a partnership." Henderson, C. J., in Cox *v.* Delano, 3 Dev. 89. The leading and well-considered cases of Loomis *v.* Marshall, 12 Conn. 69, and Denny *v.* Cabot, 6 Met. 82, are to the same effect. This rule seems to have been uniformly followed in Massachusetts. Reynolds *v.* Toppan, 15 Mass. 370; Rice *v.* Austin, 17 Mass. 197; Turner *v.* Bissell, 14 Pick. 192; Blanchard *v.* Coolidge, 22 Pick. 151; Bradley *v.* White, 10 Met. 303; Judson *v.* Adams, 8 Cush. 556; Pratt *v.* Langdon, 12 All. 544, 97 Mass. 97. The same distinction seems to be recognized in all the earlier and a few later American authorities. Shropshire *v.* Shepperd, 3 Ala. 733; Hodges *v.* Dawes, 6 Ala. 215; Scott *v.* Campbell, 30 Ala. 728; Bucknam *v.* Barnum, 15 Conn. 67; Reed *v.* Murphy, 2 Greene (Ia.) 574; Clement *v.* Hadlock, 13 N. H. 185; Fitch *v.* Hall, 25 Barb. 13; Brockway *v.* Burnap, 16 Barb. 310; Stroher *v.* Elting, 97 N. Y. 102; Johnson *v.* Miller, 16 Ohio, 431; Heckert *v.* Fegely, 6 W. & S. 139; Dunham *v.* Rogers, 1 Barr, 255; Bartlett *v.* Jones, 2 Strobh. 471; Tobias *v.* Blin, 21 Vt. 544; Bowyer *v.* Anderson, 2 Leigh, 550; Brown *v.* Higginbotham, 5 Leigh, 583.

[2] Moore *v.* Smith, 19 Ala. 774; Turner *v.* Bissell, 14 Pick. 192; Beecham *v.* Dodd, 3 Harr. Del. 485; Heimstreet *v.* Howland, 5 Den. 68; Everett *v.* Coe, 5 Den. 180; Pattison *v.* Blanchard, 5 N. Y. 186; Gibson *v.* Stone, 43 Barb. 285; Ambler *v.* Bradley, 6 Vt. 119; Bowman *v.* Bailey, 10 Vt. 170; Mason *v.* Potter, 26 Vt. 722. In Loomis *v.* Marshall, 12 Conn. 67, the parties sought to be charged as partners were to divide between them the proceeds of the sales of the goods, diminished only by the cost of selling. The difference between net *profits* and net *sales* was pressed upon the court. But it was not thought necessary to express any opinion upon the point. In Denny *v.* Cabot, 6 Met. 82, the fund to be divided was substantially the same: "For (to quote the language of the court) although, in terms, the agreement was to pay Cooper one third of the net earnings, yet that is explained by the words immediately following, by which it appears that Cooper was entitled to one third of the gross profits after deducting certain specified charges; and that in no event was he to be liable for any losses." The court then cite Loomis *v.* Marshall, *supra;* Reynolds *v.* Topham, 15 Mass. 370; Vanderburgh *v.* Hull, 20 Wend. 70; Turner *v.* Bissell, 14 Pick. 192; and proceed thus: "These cases appear to us fully to support the defence in the present case. Some of them may perhaps appear to clash with the distinction (laid down by Lord Ellenborough in Dry *v.* Boswell, 1 Camp. 329, and recognized in other cases) between sharing the gross earnings and sharing the net earnings of a business or adventure. But, however this may be, we think there is no sound distinction between an agreement to pay to a party a certain share of the gross profits and an agreement to pay a certain share of the net profits, as explained in the present contract; the clear meaning of the terms of which is, that Cabot, Appleton & Co. were to pay Cooper one third part of the profits, after making certain specified deductions therefrom, and Cooper clearly was not to be liable for any losses. If he had stipulated for a share in the profits (*whether gross or net profits*), so as to entitle him to an account, and to give him a specific lien, or a preference in payment over other creditors, and giving him the full benefit of the profits of the business, without any corresponding risk in case of loss, —

[3] 1 Camp. 329.

§ 51. **Sharing Profits generally.** — It is still often laid down by the courts that one who shares the profit of a business is partner, no matter what was the intention of the parties; following Waugh *v.* Carver to the fullest extent.[1] Other cases however hold that in this case the relationship of the parties may be shown to be other than that of partners.[2] And it may perhaps safely be said that every jurisdiction will eventually recognize the correctness of this rule.

§ 52. **Sharing Profit and Loss.** — Even where the parties share both profit and loss, they are not partners if they have not in fact created a partnership, but stand in some other relation to each other.[3]

§ 53. **Right to account as a Test.** — An attempt has been made in this country to set up another test of partnership. It has been asserted, not only by text-writers, but by eminent judges, that a person is liable as a partner, to third parties, when he has such an interest in profits as will give him a right to an account. (*a*) Undoubtedly, every partner has a right to an account of the

(*a*) 3 Kent Com. p. 25, note (*b*); Cary on Part. 11, note (*i*); Collyer on Part. § 44, and note; Lord Eldon in *Ex parte* Hamper, 17 Ves. 412; Chancellor Walworth in Champion *v.* Bostwick, 18 Wend. 184. See also Heimstreet *v.* Howland, 5 Denio, 68; Denny *v.* Cabot, 6 Met. 92.

justice to the other creditors would seem to require that he should be holden to be liable to third persons as a partner."

1 Buckner *v.* Lee, 8 Ga. 285; Perry *v.* Butt, 14 Ga. 699; Howe *v.* Dupoyster (Ky.) 7 S. W. 627; Taylor *v.* Terme, 3 H. & J. 505; Pratt *v.* Langdon, 12 All. 544, 97 Mass. 97; Champion *v.* Bostwick, 18 Wend. 184; Cushman *v.* Bailey, 1 Hill, 526; Everett *v.* Coe, 5 Den. 180; Manhattan Brass Co. *v.* Sears, 45 N. Y. 797; Cox *v.* Delano, 3 Dev. 89; Holt *v.* Kernodle, 1 Ire. 199; Mauney *v.* Coit, 86 N. C. 463; Purviance *v.* McClintee, 6 S. & R. 259; Caldwell *v.* Miller, 127 Pa. 442, 17 Atl. 983; Pierson *v.* Steinmyer, 4 Rich. 309; Cothran *v.* Marmaduke, 60 Tex. 370; Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499.

2 Meehan *v.* Valentine, 145 U. S. 611; Le Fevre *v.* Castagnio, 5 Col. 564; Burton *v.* Goodspeed, 69 Ill. 237; Smith *v.* Knight, 71 Ill. 148; Williams *v.* Soutter, 7 Ia. 435; Shepard *v.* Pratt, 16 Kas. 209; Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785; Colwell *v.* Britton, 59 Mich. 350, 26 N. W. 538; Corey *v.* Cadwell, 86 Mich. 570, 49 N. W. 611; Philips *v.* Samuel, 76 Mo. 657; Priest *v.* Chouteau, 85 Mo. 398; Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588; Gibson *v.* Smith, 31 Neb. 354, 47 N. W. 1052; Horton *v.* New Pass Gold & Silver Mining Co., 27 Pac. 376 (Nev.); Eastman *v.* Clark, 53 N. H. 276; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295; Harvey *v.* Childs, 28 Oh. St. 319; Cogswell *v.* Wilson, 11 Ore. 371, 4 Pac. 1130; Boston & Col. Smelting Co. *v.* Smith, 13 R. I. 27; Polk *v.* Buchanan, 5 Sneed, 721; Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835 (*semble*).

3 Tayloe *v.* Bush, 75 Ala. 432; Stevens *v.* Faucet, 24 Ill. 483; Chaffraix *v.* Lafitte, 30 La. Ann. 631 (but see New Orleans *v.* Gauthreaux, 32 La. Ann. 1126); Dwinel *v.* Stone, 30 Me. 384; McDonald *v.* Matney, 82 Mo. 358; Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 594; Clifton *v.* Howard, 89 Mo. 192, 1 S. W. 26; Chapline *v.* Conant, 3 W. Va. 507. See the English authorities, *ante*, § 44.

profits; but the converse is not true, that every one who has such a right is a partner. There are many relations which a man may bear to another, and in that right be entitled to an account without being liable as a partner. And it has been well said by an American writer, "In all cases where a person is to be paid for his services by a sum *proportional* to the profits, he must be entitled to an account of profits. If not, how is he to ascertain that he has what he has stipulated for?" (*b*)[1]

§ 54. **Intention the true Test.** — The true test of partnership, then, is the intention of the parties. They have agreed together for a certain purpose. If the purpose was the formation of an associated body, different from the individual parties, for which they were thereafter to act, they have formed a partnership. If however the purpose was the entrance into a relationship in which one of the parties, at least, was to act as an individual solely for himself, without becoming a member of an associated body, there is no partnership formed and the parties are therefore not partners. The intention to form a partnership may be expressed in the contract, or it may be gathered from the acts and from all the circumstances which are available for the interpretation or construction of the contract.[2] This does not mean that parties having formed their relationship are permitted to call it a partnership or otherwise at will; but that whether the parties formed the associated body which the law regards as a partnership depends upon whether they intended to form such a body. If they did so intend they are partners, though they were ignorant of the legal

(*b*) Bissett on Partnership, p. 14.

[1] The right to go into equity for an account is not confined to a partner. Any employee paid by a share of the profits may maintain a bill for an account, though he is not a partner, since a court of law is unable to take such an account. Harrington *v.* Churchward, 29 L. J. N. S. Ch. 521; Katsch *v.* Schenck, 13 Jur. 668; Ferry *v.* Henry, 4 Pick. 75; Hallett *v.* Cumston, 110 Mass. 32; Bentley *v.* Harris, 10 R. I. 434 (distinguishing Hazard *v.* Hazard, 1 Story, 371).

[2] Badeley *v.* Consolidated Bank, 38 Ch. Div. 238; Couch *v.* Woodruff, 63 Ala. 466 (*semble*); Mayrant *v.* Marston, 67 Ala. 453; Tayloe *v.* Bush, 75 Ala. 432; Loomis *v.* Marshall, 12 Conn. 69; Chaffraix *v.* Lafitte, 30 La. Ann. 631; Sangston *v.* Hack, 52 Md. 173; Waring *v.* Nat. Marine Bank, 74 Md. 278, 22 Atl. 140; Denny *v.* Cabot, 6 Met. 82; Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785; Corey *v.* Cadwell, 86 Mich. 570, 49 N. W. 611; Priest *v.* Chouteau, 85 Mo. 398; Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 594; Vibbard *v.* Roderick, 51 Barb. 616; Setzer *v.* Beale, 19 W. Va. 274. Hence, if persons who unite in a joint undertaking expressly declare that they do not mean to become partners, the law will not hold them partners as to each other, unless the actual relations into which they enter neutralize and negative their declarations. Gilpin *v.* Enderbey, 5 B. & Ald. 954; Kerr *v.* Potter, 6 Gill, 404; Freeman *v.* Bloomfield, 43 Mo. 391; Gill *v.* Kuhn, 6 S. & R. 333.

nature of their relation, and even though they may have expressly provided in the articles that they should not become partners.[1]

And conversely, though they have declared themselves to be partners, if the relationship established was not one of partnership the parties will not be regarded by the law as partners.[2]

§ 55. **Partnership inferred from Control of Business.**—It is quite certain that no mere interference with the affairs of the partnership, no advice in respect to them, not even a control of them, not even the right or the duty of interference, advice, or control, as part of an express contract, can *alone* make a party chargeable as a partner; (*c*) although they might be very influential, in connection with other circumstances, in determining the relation of a person to the partnership. Neither would the fact of joining in an order for the purchase or sale of goods, (*d*) or for any mercantile transaction, (*e*) suffice to create a partnership or its liabilities without other circumstances.

(*c*) In Barklie *v.* Scott, 1 Hudson & B. 83, the court said: "As to the stipulation that the house should be governed and directed by the defendant's advice, this does not constitute him a partner, nor give him any legal interest in the firm; it does not hold him out to the world as a partner, nor give him any share in the profits, nor empower him to dissolve, alter, or affect the partnership. Suppose that the defendant had not been the party advancing this money, but that the gift had been made by a third person, who had been desirous that the young man should have the advice of some skilful person engaged in trade, and had stipulated that the house should be directed by that advice,—could such a person be considered as a partner?" See Bryden *v.* Taylor, 2 H. & G. 400; Taylor *v.* Perkins, 26 Wend. 124; Smith *v.* Edwards, 2 H. & G. 411.

(*d*) Gibson *v.* Lupton, 9 Bing. 297. The defendants, who were never general partners, ordered wheat of the plaintiffs, by an order containing the following words: "Payment for the same to be drawn upon each of us, in the usual manner." The plaintiffs, in a letter addressed to each of the defendants, answered: "We have made a purchase for your *joint* account." At the same time, they drew upon the defendants for one-third of the price, upon each by a separate bill for one moiety of the third. They afterwards despatched the wheat, and drew other similar bills, in the same manner, for the remainder of the price; having, however, previously written them: "We hold *you both* harmless for the advance up to the period of lading and invoice." The bill of lading, on its reaching the defendants, was indorsed by each of them; the freight and charges were paid by the money of each; and the wheat was equally divided between them when it was warehoused. Upon these facts, it was held, that the defendants were not jointly liable as partners for the whole price of the goods. See also Jackson *v.* Robinson, 3 Mason, 138; Harding *v.* Foxcroft, 6 Me. 76.

(*e*) Thus the fact that two persons sign a note jointly is no evidence of copartnership between them. Hopkins *v.* Smith, 11 Johns. 161. But it has been held otherwise where two persons draw a bill of exchange. Carvick *v.* Vickery, Doug. 653, note. See also Given *v.* Albert, 5 Watts & S. 339; M'Iver *v.* Humble, 16 East, 169; Gibbons *v.* Wilcox, 2 Stark. 43; Chandler *v.* Brainard, 14 Pick. 285; Clark *v.* Reid, 11 Pick. 446; Banchor *v.* Cilley, 38 Me. 553; Chase *v.* Stevens, 19 N. H. 465.

[1] Scott *v.* Campbell, 30 Ala. 728.

[2] Oliver *v.* Gray, 4 Ark. 425.

In Ireland, a father advanced a large sum to a partnership for his minor son, who became a partner, and the father was to have the right of knowledge, advice, &c., and the accounts of the partnership were rendered to him. But, the firm failing, he was adjudged not a partner; because the articles did not provide that he might withdraw any part of the profits, and he did not withdraw them in fact. (*f*)

But where one party really engages in the business, though he acts nominally for another, he may be held as a partner. Thus where a business is carried on by a firm of which a married woman is nominally a member, though the husband transacts all the business, the intention is evidently that he shall engage in the business, and he is a partner. [1]

So where one signed partnership articles in the name of his mother, but acted as partner in the business, he was held as such.[2] So where a guardian entered into articles of copartnership in the name of his ward, but contributed his own money as capital, assisted in the business, and took the profits, he was held to be a partner, and not his ward.[3]

§ 56. **Intention to escape Liability not Enough.** — Since the intention of the parties to form an association which the law calls a partnership is the test, it is immaterial whether they expect to become individually liable. So where certain persons subscribed money for carrying on the grocery business, and called themselves "stockholders," expecting to avoid individual liability, but took no steps to form a corporation, they were held partners.[4] So where a corporation is projected, but business is carried on by the intending corporators before they have taken steps to obtain a charter, they are liable as partners.[5] They are also so liable when they vote, after the expiration of the charter, to continue the business.[6] And where a corporation is in fact formed, but is a merely nominal one, the parties really acting for a partnership, they have been held partners.[7] Where three persons who had combined to deal in land and water rights under a contract

(*f*) Barklie *v.* Scott, 1 Hudson & B. 83.

[1] Rabitte *v.* Orr, 83 Ala. 185, 3 So. 420.

[2] Bishop *v.* Austin, 66 Mich. 515, 33 N. W. 525.

[3] Miles *v.* Wann, 27 Minn. 56.

[4] Farnum *v.* Patch, 60 N. H. 294.

[5] Citizens' Bank *v.* Hine, 49 Conn. 236; Martin *v.* Fewell, 79 Mo. 401; McVicker *v.* Cone, 21 Ore. 353, 28 Pac. 76.

[6] Nat. Bank of Watertown *v.* Landon, 45 N. Y. 410.

[7] Farmer's Bank *v.* Smith, 26 W. Va. 541.

secured a charter for a corporation and took property in the corporate name, but never issued stock or engaged in business as a corporation, it was held that their relation was that of a partnership, the assets being the capital stock of the corporation.[1] And where individuals bought the assets of a railroad company but not the franchise, and carried on the road in the name of the corporation, they were held to be partners.[2] Where there is shown to be an association for business purposes it is presumed to be a partnership; if the associates wish to escape liability on the ground that the association is incorporated, they must prove that fact.[3]

§ 57. **Intention to form Corporation.** — But where persons unite to form a corporation, and believe that they have done so, it is clear that they should not be held liable as partners; for they never intended to form an association which the law calls a partnership. In accordance with this principle it is generally held that where parties believe themselves to be stockholders in a legal corporation they cannot be held liable to third persons as partners, though there is no corporate liability;[4] and it is immaterial whether the corporate liability fails by reason of defective organization, expiration of charter powers, unconstitutionality of the law under which organization was attempted,[5] excess of power, or for any other reason. It is however held in some jurisdictions that an intended corporation not legally formed is a partnership, and the stockholders are partners.[6]

Members of the supposed corporation who take part in creating a liability to a third party are individually liable to him.[7] And

[1] Shorb *v.* Beaudry, 56 Cal. 446.

[2] Chaffe *v.* Ludeling, 27 La. Ann. 607.

[3] Clark *v.* Jones, 87 Ala. 474, 6 So. 362.

[4] Gartside Coal Co. *v.* Maxwell, 22 F. R. 197; Blanchard *v.* Kaull, 44 Cal. 440 (*semble*); Humphreys *v.* Mooney, 5 Col. 282; Stafford Nat. Bank *v.* Palmer, 47 Conn. 443; Planter's & Miner's Bank *v.* Padgett, 69 Ga. 159; Tarbell *v.* Page, 24 Ill. 46; Fay *v.* Noble, 7 Cush. 188; Trowbridge *v.* Scudder, 11 Cush. 83; First Nat. Bank *v.* Almy, 117 Mass. 476 (*semble*); Ward *v.* Brigham, 127 Mass. 24; Merchants & Manufacturers' Bank *v.* Stone, 38 Mich. 779; Stout *v.* Zulick, 48 N. J. L. 599, 7 Atl. 362; Central Bank *v.* Walker, 66 N. Y. 424; Jessup *v.* Carnegie, 80 N. Y. 441 (*semble*); Medill *v.* Collier, 16 Oh. St. 599; Newburg Petroleum Co. *v.* Weare, 27 Oh. St. 343; Second Nat. Bank *v.* Hall, 35 Oh. St. 158.

[5] *Contra*, Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638.

[6] Conner *v.* Abbott, 35 Ark. 365; Coleman *v.* Coleman, 78 Ind. 344; Kaiser *v.* Lawrence Savings Bank, 56 Ia. 104; Hurt *v.* Salisbury, 55 Mo. 310; Richardson *v.* Pitts, 71 Mo. 128; Abbott *v.* Omaha Smelting Co., 4 Neb. 416. Even in these jurisdictions the stockholders could not be held as partners if the purpose of the corporation was not to do business, as where it was formed to extend and grade a street. Johnson *v.* Corser, 34 Minn. 355, 25 N. W. 799.

[7] Rianhard *v.* Hovey, 13 Ohio, 300; Rutherford *v.* Hill, 22 Ore. 218, 29 Pac. 546.

therefore if all the stockholders of a corporation knowingly engage in a business not warranted by the charter,[1] or continue business after the expiration of the charter,[2] they are liable individually. It would seem, however, that even in this case the liability is not that of partners, but is either an implied warranty of the corporate liability, analogous to the liability of one who assumes without authority to act as an agent;[3] or else a liability imposed by statute.[4]

§ 58. **Requisites of a Partnership.** — Different phrases have been employed by the courts to explain the requisites of a partnership. Thus it has been said that there must be a community of interest in property employed in business, and in the profits;[5] a community of interest for business purposes;[6] a community of interest in a business, as to which the partners are mutually principals and agents, with general powers within the scope of the business;[7] a proprietary interest in the profits as such before division, as principal trader;[8] and that the relation of agency must be created.[9] These all approximate the true rule. They are so many attempts to state the necessity for the formation of a business association or entity, for which the parties are to act, and with which their relations are established.

§ 59. **Community of Loss not Essential.** — Although it is undoubtedly true, that in much the greater number of partnerships there is a community of loss as well as of profit, the weight of authority as well as of reason seems to be decidedly in favor of the rule that there may be a legal and valid partnership, although one or more of the partners are guaranteed by the others against loss.[10] And even if one of the parties agrees to be liable for losses,

[1] Ridenour *v.* Mayo, 40 Oh. St. 9.

[2] Nat. Bank of Watertown *v.* Landon, 45 N. Y. 410.

[3] Trowbridge *v.* Scudder, 11 Cush. 83.

[4] Sullivan *v.* Sullivan Mfg. Co., 20 S. C. 79.

[5] Dame *v.* Kempster, 146 Mass. 454, 15 N. E. 927.

[6] Priest *v.* Chouteau, 85 Mo. 398.

[7] Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785. See Corey *v.* Cadwell, 86 Mich. 570, 49 N. W. 611; Cogswell *v.* Wilson, 11 Ore. 371, 4 Pac. 1130.

[8] Gibson *v.* Smith, 31 Neb. 354, 47 N. W. 1052.

[9] Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295.

[10] In spite of numerous *dicta* to the contrary, both in England and in this country, this appears to be the law. The true principle seems to be laid down by Lord Eldon in *Ex parte* Langdale, 18 Ves. 300: "A man, who is to have no profit, may be a partner, if holding himself out as such; as by lending his name. He may also be a partner when the contract is that he shall suffer no loss; and, I agree, it is not the less a partnership because part of the contract is, that they are not to suffer by bad debts, the personal negligence of him who has the custody of the articles, by fire, &c." See Brigham *v.* Dana, 29 Vt. 1. So in Gilpin *v.* Enderbey, 5 B. & Ald. 954, where, though

although he is not to participate in the profits, it is possible that there may be a partnership.[1]

§ 60. **Voluntary Associations and Clubs.** — It would seem that there must be a community of interest for business purposes; though it cannot be said that partnership exists only for buying and selling; for, as we shall see, physicians and lawyers, who neither buy nor sell professionally, may yet form a professional partnership, which is entirely legal and to which all the rules and privileges of the law of partnership apply. Usually, however, the purpose of the partnership is to buy goods and sell them again; and in all cases it must exist for the purpose of making a profit. Hence, voluntary associations or clubs, for social and charitable purposes, and the like, are not proper partnerships; nor have their members the powers and responsibilities of partners.[2]

§ 61. **Purpose of realizing Profit essential.** — If the intention of acting in common is limited to buying and making, or if a valuable product arises from a contribution to common stock of one

one of the parties was guaranteed against all debts and losses, there being no usury in the case, the court held that there was a partnership, though of a peculiar kind; and the circumstance that one of the parties was not to bear any losses was not adverted to. See Fereday *v.* Hordern, Jacob, 144; Manville *v.* Parks, 7 Col. 128; Cochran . Bartle, 91 Mo. 636, 3 S. W. 854; Pierson *v.* Steinmyer, 4 Rich. 309.

[1] For such a case, see Mandeville *v.* Mandeville, 35 Ga. 243.

[2] Flemyng *v.* Hector, 2 M. & W. 172. So "clubs" are neither "partnerships" nor "associations" within the meaning of the Winding-up Acts. *In re* St. James's Club, 2 De G., M. & G. 383. Nor is a company, the purpose of which is the purchase of lands with funds raised by subscription, and the division of such lands amongst the subscribers, a company entitled to registration under 7 & 8 Vict. ch. 110, which (§ 2) applies only to associations formed "for any commercial or trading purposes." Queen *v.* Whitmarsh, 15 Q. B. 600. See Delauney *v.* Strickland, 2 Stark. 416; Caldicott *v.* Griffiths, 8 Exch. 898; Cockerell *v.* Aucompte, 2 C. B. N. S. 440; Bright *v.* Hutton, 3 H. L. C. 341. *In re* Worcester Corn Exchange Company, 3 DeG., M. & G. 180; Cheney *v.* Clark, 3 Vt. 431. Persons who subscribe in writing certain sums for the purpose of building a meeting-house, which, when completed, is to be the property of the subscribers in the proportion of their subscriptions, are not partners. Woodward *v.* Cowing, 41 Me. 1.

So a voluntary association for charitable purposes is not a partnership. Burke *v.* Roper, 79 Ala. 138; Lafond *v.* Deems, 81 N. Y. 507. Such as a Young Men's Christian Association, Queen *v.* Robson, 16 Q. B. D. 137; an unincorporated religious society, Devoss *v.* Gray, 22 Oh. St. 159; or a Masonic Lodge, Ash *v.* Guie, 97 Pa. 493. An association formed to resist the claims of a certain patentee is not a partnership. Burt *v.* Lathrop, 52 Mich. 106, 17 N. W. 716. A political committee is not a partnership. Richmond *v.* Judy, 6 Mo. App. 465. An association formed to extend and grade a street is not a partnership. Johnson *v.* Corser, 34 Minn. 355, 25 N. W. 799.

When such an association undertakes a liability only those members are liable who either voted to incur the liability or by taking some part in the business, or in some other way, ratified the act of those who actually incurred the liability. Devoss *v.* Gray, 22 Ohio St. 159; Ash *v.* Guie, 97 Pa. 493. See *ante*, § 37.

thing by one and another thing by another, and a working on and with those things by both, this may constitute a partnership as to the ownership of that product, and in all the transactions which led to it, if the product itself is to be sold on common account, in order to realize a profit. This would be a manufacturing partnership. But if the parties thus combine stock and work for a product to be divided between them, and not for sale, but for each party to keep and use the share that falls to him, it is not a partnership.[1] So, where one party let another have all the timber on his land, and the other was to saw it, and pay to the first one-fifth of the gross proceeds, this did not constitute them partners.[2]

In short, the law of partnership requires a community of interest in the profits resulting from the business or work done. (*g*) Thus,

(*g*) Thus in Hoare *v.* Dawes, 1 Doug. 371, several persons had employed a broker to purchase a lot of tea, of which they were to have a separate share. The question being whether the employers of the broker were partners, so as to make any one of them liable for the price of all the tea so purchased, it was held, that they were not; since there was no communion of profit and loss, but merely an undertaking with the broker by each for a particular quantity. So in Coope *v.* Eyre, 1 H. Bl. 37, where Lord Loughborough says: "If the parties be jointly concerned in the purchase they must also be jointly concerned in the future sale; otherwise they are not partners." On the same principle joint purchases of land, or even of merchandise, by two or more cannot have the effect of making them partners, nor of raising a presumption that they are so. Porter *v.* M'Clure, 15 Wend. 187; Ballou *v.* Spencer, 4 Cow. 163; Brady *v.* Calhoun, 1 P. & W. 140; Gilmore *v.* Black, 11 Me. 485;

[1] An agreement to cultivate a farm "on shares" is of this sort. The better view is that where the object is to divide the crop in kind between the partners it is no partnership. Gardenhire *v.* Smith, 39 Ark. 280; Blue *v.* Leathers, 15 Ill. 31; Donnell *v.* Harshe, 67 Mo. 170; Musser *v.* Brink, 68 Mo. 242, 80 Mo. 350; Clifton *v.* Howard, 89 Mo. 192; Putnam *v.* Wise, 1 Hill, 234; Reynolds *v.* Pool, 84 N. C. 37; Day *v.* Stevens, 88 N. C. 83 (explaining Curtis *v.* Cash, 84 N. C. 41); Brown *v.* Jaquette, 94 Pa. 113; Murray *v.* Stevens, 1 Rich. Cas. 205. *Contra*, Holifield *v.* White, 52 Ga. 567 (but see Holloway *v.* Brinkley, 42 Ga. 226; Smith *v.* Summerlin, 48 Ga. 425).

In accordance with this principle, it is almost universally held that a combination to produce something and divide the product is not a partnership. Gibson *v.* Lupton, 9 Bing. 297. So of a combination to work a gold-mine and divide the gold, Gilman *v.* Cunningham, 42 Me. 98; to fish and divide the fish caught, Hurley *v.* Walton, 63 Ill. 260; to make and divide bricks, Haycock *v.* Williams, 54 Ark. 384, 16 S. W. 3; Lamont *v.* Fullam, 133 Mass. 583; Chapman *v.* Lipscomb, 18 S. C. 222; to manufacture and divide lumber, Robinson *v.* Bullock, 58 Ala. 618; Stoallings *v.* Baker, 15 Mo. 481. *Contra*, Musier *v.* Trumpbour, 5 Wend. 274. See Everitt *v.* Chapman, 6 Conn. 347; Loomis *v.* Marshall, 12 Conn. 69; Bucknam *v.* Barnum, 15 Conn. 67, 73.

So where the owner of land agreed to allow a ditch to be built through the land, and to pay a quarter of the expense, and he was to have a quarter interest in the ditch and water, this was held not to be a partnership. Fitzell *v.* Leaky, 72 Cal. 477, 14 Pac. 198.

Where, however, the agreement is interpreted as securing a division of the proceeds of the product, and not of the product itself, there is a partnership. Ensign *v.* Wands, 1 Johns. Cas. 171; Farmers' Ins. Co. *v.* Ross, 29 Oh. St. 429; Whitney *v.* Ludington, 17 Wis. 140.

[2] Fail *v.* McRee, 36 Ala. 61.

if persons purchase goods to be sent on a mercantile adventure, the proceeds to be reinvested in a return cargo, though there be a partnership in the buying of the goods, and in the sending of them abroad and there selling them, there is still no partnership in the purchase or the ownership of the return cargo, unless that cargo was to be sold for the common benefit. For if it is to be divided *in specie*, each of the company taking in severalty his share, it may be doubted whether it could be said that there was any partnership in the return cargo. (*h*)

So if three or four persons agree to buy jointly all of a certain commodity in the market, and agree that one only shall buy for all, and that what he buys shall be divided between them, they are not partners, for the want of a community in the disposition of the merchandise. (*i*)

§ 62. **Professional Partnerships.** — Professional men, like physicians or lawyers, are partners, if the earnings of all come into a common stock or fund, and not until then are divided and held in severalty. (*j*) They may call themselves partners; but if each charges in his own favor what he earns, and each has a right to demand and sue for this in severalty, they are not partners *inter se*, however liable they might be to others from calling themselves so. (*k*)

§ 63. **Contributions of Capital.** — It is not necessary that each partner should bring into the common stock both labor and property. It is a familiar principle, quite frequently put in practice, that one or more of the partners may contribute money alone,

Putnam *v.* Wise, 1 Hill, 234; Barton *v.* Williams, 5 B. & Ald. 395; Noyes *v.* Cushman, 25 Vt. 390.

(*h*) Holmes *v.* United Insurance Co., 2 Johns. Cas. 329; Post *v.* Kimberly, 9 Johns. 470. See Thorndike *v.* De Wolf, 6 Pick. 120; United Insurance Co. *v.* Scott, 1 Johns. 106. The same principle is frequently illustrated in cases where goods, purchased either with joint or separate funds, are sent on a common adventure, but are to be sold by the consignee or agent on separate account. Harding *v.* Foxcroft, 6 Me. 76; Jackson *v.* Robinson, 3 Mason, 138; Hall *v.* Leigh, 8 Cranch, 50. See also Felichy *v.* Hamilton, 1 Wash. C. C. 491; Osborne *v.* Brennan, 2 N. & McC. 427; Gibson *v.* Lupton, 9 Bing. 297; Sims *v.* Willing, 8 S. & R. 103.

(*i*) Coope *v.* Eyre, 1 H. Bl. 37. See Ward *v.* Gaunt, 6 Duer, 257.

(*j*) Bond *v.* Pittard, 3 M. & W. 357. In Darracott *v.* Penington, 34 Ga., the court consider the nature and objects of a law partnership. See Atkinson *v.* Mackreth, L. R. 2 Eq. 570.

(*k*) Finckle *v.* Stacy, Sel. Ca. Ch. 9, where joint articles were entered into by two persons for the doing a particular piece of work, on account of which several sums of money were jointly received by them, and immediately divided between them; though the court was of opinion that it was not to be considered a partnership, but only an agreement to do a particular act, between which there was great difference; and that it was so was plain, for the money which they received they immediately divided, and did not lay out on a common account. See also Porter *v.* M'Clure, 15 Wend. 187.

while one or two others may contribute labor and money, or labor alone. (*l*) And indeed all may contribute labor, and none money. (*m*)

The doctrine is laid down in some cases, that there may be a partnership in the profits, where there is none in the property. (*n*) This seems opposed to the nature of a partnership, in which there

(*l*) Reid *v.* Hollinshead, 4 B. & C. 867; *Ex parte* Chuck, 8 Bing. 469; Candler *v.* Candler, 6 Madd. 141; Bovill *v.* Hammond, 6 B. & C. 149; Dob *v.* Halsey, 16 Johns. 34; Gregg Township *v.* Half-Moon Township, 2 Watts, 342; Simpson *v.* Fetz, 1 McCord Ch. 213; Potter *v.* Moses, 1 R. I. 430; Winship *v.* Bank of the United States, 5 Pet. 529; Tibbatts *v.* Tibbatts, 6 McLean, 80; Brace *v.* Washburn, 43 Me. 564; Wood *v.* Vallette, 7 Oh. St. 122. See Dwinel *v.* Stone, 30 Me. 384; Wright *v.* Davidson, 13 Minn. 449; Parker *v.* Canfield, 37 Conn. 250; Pettee *v.* Appleton, 114 Mass. 114; Rowland *v.* Long, 45 Md. 439. So an agreement that A. shall furnish a stock of goods, shop fixtures, &c., and that B. shall pay the rent of the shop, manage the business, and pay A. interest on one-half of the fixtures, the profits to be divided equally, renders A. and B. partners as to third parties, although it be orally understood, at the time of executing the agreement, that the share of profits to B. shall be in lieu of salary. Brigham *v.* Clark, 100 Mass. 430. Where one contributes the use of real estate, and the other furnishes capital and labor, whereby the former is utilized, the profits to be divided, a partnership is constituted. Wood *v.* Beath, 23 Wis. 254; Dalton *v.* Dalton, 33 Ga. 343. Anything of value for the use of the partnership, as for example a license to trade, is a sufficient contribution to the joint funds. The Herkimer, Stewart Adm. 23, 24. Nor need the property itself be put into the common stock. On the other hand, the capital of a firm may consist of the mere use of property owned by the individual partners separately. Chancellor Walworth, in Champion *v.* Bostwick, 18 Wend. 183.

(*m*) Not only may one partner contribute labor alone to the joint undertaking, but the contributions of all the partners, and the whole capital of the firm, may consist substantially of personal services, as is generally the case in professional partnerships between solicitors, physicians, &c. See Tench *v.* Roberts, 6 Madd, 145, note (*a*). So where two commission houses, one in London, the other in Rio Janeiro, in accordance with mutual stipulations, recommend customers to each other, and divide equally the commissions on the sale of all goods thus recommended by the one house to the other, *quoad hoc* they are partners, the capital of the partnership being the partners' mutual exertion of influence in each other's favor. Cheap *v.* Cramond, 4 B. & Ald. 663. See Dix *v.* Otis, 5 Pick. 38.

(*n*) Meyer *v.* Sharpe, 5 Taunt. 74; *Ex parte* Hodgkinson, 19 Ves. 291; Dry *v.* Boswell, 1 Camp. 329; Wish *v.* Small, 1 Camp. 331, note; Patterson, J., in Burnell *v.* Hunt, 5 Jur. 650; Mair *v.* Glennie, 4 M. & S. 240; Ward *v.* Thompson, 1 Newb. Adm. 95; Bryant *v.* Wardell, 2 Exch. 479; Brigham *v.* Dana, 3 Williams, 1. [Bullard *v.* Smith, 139 Mass. 492, 2 N. E. 86.] In Chase *v.* Barrett, 4 Paige, 148, however, the doctrine is distinctly asserted by Walworth, Chancellor, that, to "constitute a partnership as between the parties themselves, there must be a joint ownership of the partnership funds, according to the intention of the parties." See also Dwinel *v.* Stone, 30 Me. 384; Lowry *v.* Brooks, 2 McCord, 421; Ogden *v.* Astor, 4 Sandf. 322; Beecham *v.* Dodd, 3 Harr. (Del.) 485; McCauley *v.* Cleveland, 21 Mo. 438. So where three parties agree "to enter upon an operation embracing the purchasing and selling of shingles," — one to purchase, and the other two to receive and sell, the shingles to be the property of these two, who were to furnish the capital, — all to share equally the profits and losses, they are partners. Getchell *v.* Foster, 106 Mass. 42.

is a contribution of something for the joint benefit. Whatever is contributed becomes the property of the partnership, and the partners have equal power over it. The true explanation seems to be that in such cases, though the property itself is not owned by the partnership, yet the use of it forms part of the capital stock, and is the contribution of that partner to whom the property belongs. (*o*) [1]

§ 64. **Failure of essential Element of Partnership.** — The principles or rules above stated as defining or describing a partnership, may be further illustrated by cases in which joint business transactions have been conducted, but were held not to constitute a partnership, for the want of some essential ingredient, as where the contributions of all the parties were not mingled into common stock. (*p*) So where the capital and labor employed were not combined together for business purposes and a common profit. (*q*)

(*o*) Hence the creditors of one who is partner only in the profits cannot take in execution the property which is contributed as capital wholly by the other partner. *Ex parte* Hamper, 17 Ves. 404 ; *Ex parte* Rowlandson, 1 Rose, 89 ; Blanchard *v.* Coolidge, 22 Pick. 151 ; Bartlett *v.* Jones, 2 Strobh. 471.

(*p*) In Smith *v.* Wright, 5 Sandf. 113, two mercantile houses had carried on a joint business under the following arrangement: Each firm agreed, in its own name and with its own funds, to make purchases and sales of flour and other produce. But all such contracts were to be made for the joint account and benefit of the two firms, who were to share equally in the profits and losses. resulting from the separate dealings of each firm in this particular line of business. Upon the question whether this agreement constituted the parties to it partners, Sandford, J., said: "There was no union of funds contemplated by the agreement. Each firm was to make and fulfil its own contracts. There was no union of services, because it might so happen that one of the firms would be unable, or deem it unwise, to make any contracts at all; and yet, in the absence of bad faith, it would participate in the profits, and would certainly be liable to share the losses of the contracts made by the other firm. The whole effect of the agreement was to bind two distinct mercantile houses, acting in their own names, separately and independently of each other, to share the profits and losses, when they should be ascertained, arising from one particular department of their trade. We think that this did not constitute the two firms copartners in the contracts, which the respective separate firms made in the transaction of that portion of their business." Benson *v.* M'Bee, 2 McMullen, 91.

(*q*) Thus a deed of assignment by a debtor of all his property to trustees for the benefit of creditors, containing a clause by which the trustees are authorized to carry on the trade of the debtor, will not make the creditors who sign the deed partners, if the carrying on of the business is merely auxiliary to winding up the debtor's affairs, and has in view merely the realization of his property. Owen *v.* Body, 5 A. & E. 28; Janes *v.* Whitbread, 11 C. B. 406 ; Coate *v.* Williams, 9 C. B. 481.

[1] See the language of Lord Cairns in Syers *v.* Syers, 1 App. Cas. 174, 181. By agreement between the partners, the title to property used in the business may remain in one partner. In such a case the use of the property is contributed, and belongs to the partnership. Rushing *v.* Peoples, 42 Ark. 390 ; Stumph *v.* Bower, 76 Ind. 157 ; Hankey *v.* Becht, 25 Minn. 212 ; Clements *v.* Jessup, 36 N. J. Eq. 569.

And it seems that there is a difference between an enterprise undertaken by a number of persons jointly, with the intent thereby to diminish a loss, and one for the sake of profit, properly speaking. (*r*)

A mere contingent interest in property, without right in the property of the firm and without responsibility for losses, constitutes no partnership. (*s*).

§ 65. **Typical Form of Partnership.** — The most unmistakable, and perhaps the most common, form of partnership, is where two or more persons agree to contribute both capital and labor, and to share in both profit and loss, equally or in certain specified proportions. (*t*) Such an agreement being executed, there can be no question as to the existence of a complete partnership.[1]

(*r*) As where underwriters, having separately insured, and separately accepted an abandonment of a vessel, then unite in prosecuting the original voyage, "it is carrying the general principle too far to consider them in the light of common partners," since they take the vessel only for the purpose of diminishing a loss, and with no other view than to sell her at its termination. Livingston, J., in United Ins. Co. *v.* Scott, 1 Johns. 112. So, where a debtor, in consideration of his indebtedness, transfers the control of his business to his creditors, the latter to receive a large share of the profits until the indebtedness of the former shall be reduced to a specified amount, the debtor and his creditors are not partners. Brandred *v.* Muzzy, 1 Dutch. 268. See Price *v.* Groom, 2 Exch. 542; *post*, § 74.

(*s*) Com. *v.* Bennett, 118 Mass. 443; Haskins *v.* Warren, 115 Mass. 514; Campbell *v.* Dent, 54 Mo. 325; Eastman *v.* Clarke, 53 N. H. 276; Bendell *v.* Hettrick, 45 How. (N. Y.) Pr. 198; Crawford *v.* Austin, 34 Md. 49; Morgan *v.* Stearns, 41 Vt. 397; Chapline *v.* Conant, 3 W. Va. 507; Parker *v.* Fergus, 43 Ill. 437; Smith *v.* Vanderberg, 46 Ill. 34; Mason *v.* Hackett, 4 Nev. 420; Hargrave *v.* Conroy, 4 Green (N. J.), 281. As to special facts which do not constitute a partnership, see further Morrison *v.* Cole, 30 Mich. 102, contract of one to deliver to the other hay, which the latter is to take to market and sell; Beckwith *v.* Talbot, 2 Col. 639, contract to keep and sell cattle; Anten *v.* Ellingwood, 51 How. (Pr.) 359, editing and conducting a newspaper; Marsh *v.* N. W. Ins. Co., 3 Biss. 351; Lewis *v.* Greider, 51 N. Y. 231, single mercantile adventure, — series of adventures; but see Smith *v.* Wright, 4 Abb. App. 274; cheese-factory association, Hawley *v.* Keeler, 62 Barb. 231; purchase of land and erecting buildings thereon, Kelshaw *v.* Jukes, 8 L. T. N. S. 387; joint contract to perform labor and furnish materials, each a specific part, Smith *v.* Moynahan, 44 Cal. 53; advance of money for prosecution of business to be reimbursed out of sales, with share of profits in lieu of interest, Lintner *v.* Millikin, 47 Ill. 178. See also Edwards *v.* Tracy, 62 Pa. 374; Dailey *v.* Hall, 5 Bush, 549; Freese *v.* Ideson, 49 Ill. 191; Parker *v.* Canfield, 37 Conn. 317. A debt of A. is transferred to and assumed by B., who is to pay it out of the profits of a partnership. This does not make A. a member of the firm. Delaney *v.* Timberlake, 23 Minn. 383. [So an agreement that one party should furnish logs, the other saw them at his mill, and the proceeds after payment of the expense of marketing and selling be divided, does not create a partnership. Nelms *v.* McGraw, 93 Ala. 245, 9 So. 719.]

(*t*) As to what particular facts constitute a partnership in special cases, see further *Ex parte* Good, 5 Ch. D. 46; Duff *v.* McGuire, 99 Mass. 300; Decker *v.*

[1] Metcalf *v.* Royal Exchange Assur. Co., Barnard. Ch. 343; Green *v.* Beesley, 2 Bing. N. C. 108; Brown *v.* Tapscott, 6 M. & W., 119; Wilson *v.* Whitehead, 10 M. & W.

Where parties agree to enter into an association for the purpose of buying and selling, and carrying on a joint business indefinitely, no stipulation for dividing profit and loss is necessary, as that is an incident to the prosecution of their joint business.[1]

An agreement for a division of profits raises a presumption of partnership.[2]

§ 66. **Partnership in a single Transaction.** — It not unfrequently happens, that persons enter into partnership without knowing it; that is, they make a bargain together, without knowing that it creates or involves a partnership, and subjects them to the law of partnership. This occurs most frequently when the agreement relates to a single transaction, or to one or two only. There is a common impression that nothing is a partnership at law which does not cover the whole ground of some kind of business; but this is not so. If, for example, one has goods in the hands of a factor or commission merchant, and he and another person enter into an agreement for a valid consideration to share the profit and loss of those goods, this constitutes them partners; and the rule has been applied in such a case, where the owner of the goods agreed to guarantee to the other party the solvency of the commission house. (*u*) So persons associating, and contributing

Howell, 42 Cal. 636; mining enterprises, Pettee *v.* Appleton, 114 Mass. 114; Adams *v.* Carter, 53 Ga. 160; brickmaking, Farmer's Ins. Co. *v.* Ross, 29 Ohio St. 429; farming, Beauregard *v.* Case, 91 U. S. 134; leasing a railroad, Wills *v.* Simmonds, 51 How. (Pr.) 48; agreement between tinner and plumber to work together, Tyler *v.* Scott, 45 Vt. 261; jobbing, Gillbank *v.* Stephenson, 31 Wis. 592; agreement to purchase and man a ferry-boat, Whitman *v.* Porter, 107 Mass. 522; joint-stock association, unincorporated, for purchase of land and boring for oil, Hedge's Appeal, 63 Pa. 273; lumbering enterprise, Upham *v.* Hewett, 42 Wis. 85.

(*u*) Salomons *v.* Nissen, 2 T. R. 674. So, if two mercantile houses recommend consignments to each other, and divide the gross commissions on all sales of goods so recommended, *quoad hoc* they are partners. Cheap *v.* Cramond, 4 B. & Ald. 663. So, also, where two jointly undertake to procure a cargo for a vessel, the commission therefor to be divided between them. Bovill *v.* Hammond, 6 B. & C. 149. And where D. & W. were owners of a quantity of salt, taken to secure themselves

503; Emanuel *v.* Draughn, 14 Ala. 303; Soulé *v.* Hayward, 1 Cal. 345; Fisher *v.* Sweet, 67 Cal. 228, 7 Pac. 657; Doak *v.* Swann, 8 Me. 170; Wadsworth *v.* Manning, 4 Md. 59; Goddard *v.* Pratt, 16 Pick. 412; Quine *v.* Quine, 9 Sm. & M. 155; Halsted *v.* Schmelzel, 17 Johns. 80; Cumpston *v.* McNair, 1 Wend. 457; Griffith *v.* Buffum, 22 Vt. 181.

[1] Miller *v.* Hughes, 1 A. K. Marsh. 181; Barrett *v.* Swann, 17 Me. 180.

[2] Badeley *v.* Consolidated Bank, 38 Ch. Div. 238; Meehan *v.* Valentine, 145 U. S. 611; *In re* Francis, 2 Sawy. 286, 7 N. B. R. 359; Duryea *v.* Burt, 28 Cal. 569; Dubos *v.* Hoover, 25 Fla. 720, 6 So. 788; Niehoff *v.* Dudley, 40 Ill. 406; Lockwood *v.* Doane, 107 Ill. 235; Corey *v.* Cadwell, 86 Mich. 570, 49 N. W. 611; Philips *v.* Samuel, 76 Mo. 657; Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835 (*semble*).

money to obtain a bill for a railroad, in Parliament, were held to be partners in this enterprise. (*v*) A known and acknowledged partnership, doing a regular business, may enter into a bargain for purchase, sale, and joint profit, with a third party, in regard to some single transaction, which makes them all partners therein. In such case, the third person is not admitted into the former partnership; nor is the partnership which is created by the bargain one between the old partnership and the new man; but the members of the old partnership, and the third person, all as individuals, constitute a new partnership. (*w*)

§ 67. **Partnership to deal in Land.** — It is generally held that where two agree to buy land and re-sell it, sharing the profit, this constitutes them partners.[1] It makes no difference that one party furnishes the money and takes title to the land, while the other furnishes his own services.[2] It has however been held that such an agreement did not constitute a partnership, but was a single joint adventure.[3]

§ 68. **Relationships other than Partnership.** — In accordance with the principles that have been laid down, if the parties have formed a relation *inter se* which is not in fact the creation of a partnership, their act cannot be relied upon to make them partners. For instance, if one becomes the servant, creditor, or landlord of the other he cannot, merely by coming into such a relation, be declared a partner, though in fact he may receive compensation in the form of profits. This is now generally recognized in the cases.

§ 69. **Agent or Servant.** — It is now quite settled that one acting

against their joint liability as indorsers of a note, and by agreement between them D. took the salt to market to sell on joint account, and did sell it, and the proceeds were applied for the joint benefit, it was held, that D. & W. were partners in this transaction. Cumpston *v.* McNair, 1 Wend. 457. In like manner, if the proprietors of separate lines of stage-coaches hire and keep a stable in common for their coach horses, and employ and pay a hostler at their joint expense, a partnership exists between them for these purposes. Ripley *v.* Colby, 23 N. H. 438. See Bentley *v.* White, 3 B. Mon. 268; Benson *v.* M'Bee, 2 McMull, 91.

(*v*) Holmes *v.* Higgins, 1 B. & C. 74

(*w*) *Ex parte* Gellar, 1 Rose, 297. [For other instances of partnerships in a single transaction, see Robbins *v.* Laswell, 27 Ill. 365 (buying and selling cattle); Meador *v.* Hughes, 14 Bush 652 (buying and packing hogs); Staples *v.* Sprague, 75 Me. 458 (cutting and packing ice); Lynch *v.* Thompson, 61 Miss. 354 (raising and dismantling a sunken vessel); Henry *v.* Bassett, 75 Mo. 89 (attorneys jointly employed in a law-suit).]

1 Moore *v.* Davis, 11 Ch. D. 261; Yeoman *v.* Lasley, 40 Oh. St. 190: Hulett *v.* Fairbanks, 40 Oh. St. 233; Canada *v.* Barksdale, 76 Va. 899.

2 Simpson *v.* Tenney, 41 Kas. 561, 21 Pac. 634.

3 Clark *v.* Sidway, 142 U. S. 682.

for another as agent or servant does not become a partner with liabilities as such, merely by receiving a certain proportion of the profits as his compensation.[1] So where a broker or factor is paid by a proportion of the profits of sale he is not a partner.[2] So it is generally held that sailors, who receive in lieu of wages a certain share of the profits of a voyage, are not thereby made partners with the other participators in the profits.[3] But where

[1] Wilkinson *v.* Frasier, 4 Esp. 182; Mair *v.* Glennie, 4 M. & S. 240; Geddes *v.* Wallace, 2 Bligh, 270; Stocker *v.* Brocklebank, 3 McN. & G. 250; Walker *v.* Hirsch, 27 Ch. D. 460; Berthold *v.* Goldsmith, 24 How. 536; Hazard *v.* Hazard, 1 Story, 371; Moore *v.* Smith, 19 Ala. 774; Tayloe *v.* Bush, 75 Ala. 432; Olmstead *v.* Hill, 2 Ark. 346; Haycock *v.* Williams, 54 Ark. 384; Le Fevre *v.* Castagnio, 5 Col. 564; Pond *v.* Cummins, 50 Conn. 372; Stevens *v.* Faucet, 24 Ill. 483; Fawcett *v.* Osborn, 32 Ill. 411; Macy *v.* Combs, 15 Ind. 469; Holbrook *v.* O'Berne (Ia.), 9 N. W. 291; Chaffraix *v.* Price, 29 La. Ann. 176; Miller *v.* Chandler, 29 La. Ann. 88; Allen *v.* Dunn, 15 Me. 292; Braley *v.* Goddard, 49 Me. 115; Bull *v.* Schuberth, 2 Md. 38; Reddington *v.* Lanahan, 59 Md. 429; Baxter *v.* Rodman, 3 Pick. 435; Blanchard *v.* Coolidge, 22 Pick. 151; Partridge *v.* Kingman, 130 Mass. 476; Hamper's Appeal, 51 Mich. 71, 16 N. W. 236; Gill *v.* Ferris, 82 Mo. 156; Newman *v.* Bean, 21 N. H. 93; Atherton *v.* Tilton, 44 N. H. 452; Nutting *v.* Colt, 7 N. J. Eq. (3 Halsted) 539; Smith *v.* Perry, 29 N. J. L. (5 Dutcher) 74; Chase *v.* Barrett, 4 Paige, 148; Vanderburgh *v.* Hull, 20 Wend. 70; Barckle *v.* Eckart, 1 Den. 337, 3 N. Y. 132; Lewis *v.* Greider, 51 N. Y. 231; Conklin *v.* Barton, 43 Barb. 435; Ross *v.* Drinker, 2 Hall, 415; Ogden *v.* Astor, 4 Sandf. 311; Motley *v.* Jones, 3 Ired. Eq. 144; McArthur *v.* Ladd, 5 Ohio 514; Miller *v.* Bartlet, 15 S. & R. 137; Potter *v.* Moses, 1 R. I. 430; Lowry *v.* Brooks, 2 McCord, 421; Norment *v.* Hull, 1 Humph. 320; Goode *v.* McCartney, 10 Tex. 193; Cothran *v.* Marmaduke, 60 Tex. 370; Buzard *v.* First Nat. Bank, 67 Tex. 83, 2 S. W. 54; Missouri Pac. Ry. *v.* Johnson (Tex.), 7 S. W. 838; Brown *v.* Watson, 72 Tex. 216, 10 S. W. 395; Wilkinson *v.* Jett, 7 Leigh, 115; Kellogg *v.* Griswold, 12 Vt. 291; Stearns *v.* Haven, 16 Vt. 87; Mason *v.* Potter, 26 Vt. 722; Clark *v.* Smith, 52 Vt. 529; Sodiker *v.* Applegate, 24 W. Va. 411; Whitney *v.* Ludington, 17 Wis. 140; Nicholaus *v.* Thielges, 50 Wis. 491, 7 N. W. 341; La Flex *v.* Burss, 77 Wis. 538, 46 N. W. 801. Thus, in Muzzy *v.* Whitney, 10 Johns. 226, A. & B. had agreed with a turnpike corporation to build and complete a certain road. They afterwards contracted with C. "to let him have a share of the profits, if any, in making the second ten miles of the road, in proportion to the help he afforded in completing the same, the one half of it to be taken from A.'s part, and the other from B.'s part." It was held that this agreement constituted no partnership between the parties, but only appeared to be a mode of paying C. for his help and labor. In Rawlinson *v.* Clarke, 15 M. & W. 292, A., a surgeon and apothecary, sold out his business to B., and further agreed to employ himself for a year in transferring his business to B., — in consideration whereof B. agreed to give A., during the year, a moiety of the clear profits of the trade. It was held that by this agreement A. & B. were not made partners; and that, upon a view of the whole deed, it would bear no other construction than that A. was to receive nothing more than a salary for the services he was to afford to B., in helping him to continue the business. See Salter *v.* Ham, 31 N. Y. 321.

[2] Benjamin *v.* Porteus, 2 H. Bl. 590; Dixon *v.* Cooper, 3 Wils. 40; Gibbons *v.* Wilcox, 2 Stark. 43; Hesketh *v.* Blanchard, 4 East 144; Smith *v.* Watson, 2 B. & C. 401.

[3] Wilkinson *v.* Frasier, 4 Esp. 182; Perrott *v.* Bryant, 2 Y. & Coll. 61 (explaining Coppard *v.* Page, Forrest, 1); Mair *v.* Glennie, 4 M. & S. 240. Duryee *v.* Elkins, 1 Abb. Adm. 529; Reed *v.* Hussey, Bl. & H. 525; Brown *v.* Hicks, 24 F. R. 811;

one agreed to enter into a business, advance a certain sum of money, and take general charge of the business, and was to receive as compensation a fixed sum weekly and such proportion of the net profits as the sum he advanced bore to the whole capital, it was held that he became connected with the business, and was a partner.[1]

§ 70. **Creditor.** — Where one lends money to be used in business, receiving a part of the profits of the business in lieu of or in addition to interest on the loan, taking however no part in the conduct of the business, he is not a partner.[2] But in order that it should be a loan, and not capital of a partnership, it must be clear that the money is to be repaid at all events whether the business is successful or not.[3] It must also be clear that the parties do not contemplate the formation of an entity which is in fact a partnership, of which the lender shall be a member. Thus in Pooley *v.* Driver,[4] where the agreement provided that the money lent should be employed in the business, and should not be drawn out during the continuance of the partnership which carried it on, and should be paid back six months after the end of the partnership, and that the lender should receive an amount of profits based on the proportion of the loan to the whole amount invested in the business, the agreement was held to create a partnership. In such a case the advance is really made to the firm, not to the other partner personally.[5] It would seem, however, that the part-

Coffin *v.* Jenkins, 3 Story, 108; The Crusader, 1 Ware, 437; Rice *v.* Austin, 17 Mass. 197; Baxter *v.* Rodman, 3 Pick. 435; Grozier *v.* Atwood, 4 Pick. 234.

So, in Bishop *v.* Shepherd, 23 Pick. 492, 494, the court said: "It has often been held that upon these whaling voyages, carried on under a shipping-paper and form of contract like that exhibited in the present case, although the officers and seamen respectively are to receive a share of the proceeds of the oil and other acquisitions of the ship as their only compensation, yet they are not partners or part-owners of the oil with the owners of the ship; but, on the contrary, the oil, *before division*, is the property of the owners. The oil, in the first instance, being the property of the owners, it remains theirs until some settlement or adjustment."

1 Fougner *v.* First Nat. Bank, (Ill.) 30 N. E. 442.

2 Bullen *v.* Sharp, L. R. 1 C. P. 86; *Ex parte* Tennant, 6 Ch. D. 303; Meehan *v.* Valentine, 145 U. S. 611; Williams *v.* Fletcher, 129 Ill. 356, 21 N. E. 783; Clark *v.* Barnes, 72 Ia. 563, 34 N. W. 419; Sheridan *v.* Medara, 10 N. J. Eq. (2 Stoct.) 469; Richardson *v.* Hughitt, 76 N. Y. 55; Eager *v.* Crawford, 76 N. Y. 97; Curry *v.* Fowler, 87 N. Y. 33; Cassidy *v.* Hall, 97 N. Y. 159; Harvey *v.* Childs, 28 Oh. St. 319; Hart *v.* Kelley, 83 Pa. 286; Boston & Colorado Smelting Co. *v.* Smith, 13 R. I. 27. In Drake *v.* Ramey, 3 Rich. 37, where the profits of a partner were by agreement paid to his individual creditor, the latter was not a partner.

But see *contra* Parker *v.* Canfield, 37 Conn. 250; Conkling *v.* Washington University, 2 Md. Ch. 497; Bailey *v.* Clark, 6 Pick. 372 (*semble*).

3 Eager *v.* Crawford, 76 N. Y. 97.

4 5 Ch. D. 458.

5 See Magovern *v.* Robertson, 116 N. Y. 61, 22 N. E. 398; Southern Fertilizer Co.

nership relation is not established where there is a mere loan of money, unless the lender gets a right to exercise some control over the business.[1]

If money be lent to a firm for more than legal interest, this would be a usurious loan, (*x*) but would not make the lender a partner.

§ 71. **Lessor.** — Where the owner of property leases it for business purposes, agreeing to receive in return a proportion of the profits of the business, he receives the amount merely as rent, and is not a partner in the business.[2]

So where one party took cattle of the other party to fatten, and

(*x*) Gestons *v.* Brooke, Cowp. 793; Parker *v.* Ramsbottom, 3 B. & C. 257. When the principal is at hazard, there can be no usury. Accordingly, in Morse *v.* Wilson, 4 T. R. 353, where the lender of money was to receive a share of the profits of a trade in addition to legal interest, and to be liable to no losses, it was contended in his behalf that the contract was not usurious, inasmuch as, by sharing in the profits, he was liable to creditors for all the partnership debts, and thus his principal was in hazard. But Lord Kenyon, C. J., said: "Nothing can be clearer than this case. The plaintiff, without having any partnership in contemplation, lent 2,000*l.* to H. Wilson, for which he was to receive not only 5*l.* per cent interest, but also such surplus profits as should arise from these two shares in the business, he himself not being bound, on the other hand, to make good to the partners any part of the losses which the trade might sustain. The simple question is, Why, then, this is not an agreement to receive more than the 5*l.* per cent allowed by law for the forbearance of a loan? Most unquestionably it is; and it is therefore void. It has been argued, however, that this was not an usurious contract, because the principal was put in hazard, as it was liable to the partnership creditors: but it was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; for, as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade." Buller, J.: "In this agreement provision is made to receive the profits, but none to engage for the losses, of the trade. And, therefore, it is not true that the plaintiff's principal was at stake; since, by the terms of the contract, the trade is to be carried on by the other partners, and the plaintiff is only liable to make good the losses of the trade in the event of the insolvency of the other partners. But, as between these parties, if there be any losses, they must be borne by the defendant and the other partner; and, if there be any profit, the plaintiff is to receive his proportion of it." On the other hand, in Morisset *v.* King, 2 Burr. 891, a stipulation between the parties, by which the person advancing money to a trader was to be liable for a moiety of the losses by the trade, seems to have determined the court in holding the transaction not to be usurious.

v. Reams, 105 N. C. 283, 11 S. E. 467; Rosenfield *v.* Haight, 53 Wis. 260, 10 N. W. 378.

[1] Clark *v.* Barnes, 72 Ia. 563, 34 N. W. 419.

[2] Parker *v.* Fergus, 43 Ill. 437; Holmes *v.* Old Colony R. R., 5 Gray 58; Thayer *v.* Augustine, 55 Mich. 187, 20 N. W. 898; Reed *v.* Murphy, 2 Greene (Ia.), 574; Johnson *v.* Miller, 16 Ohio, 431; England *v.* England, 1 Baxt. 108; Felton *v.* Deall, 22 Vt. 170; Bowyer *v.* Anderson, 2 Leigh, 550; Chapline *v.* Conant, 3 W. Va. 507.

Contra, Dalton City Co. *v.* Hawes, 37 Ga. 115; Powell *v.* Moore, 79 Ga. 524, 4 S. E. 383; and see Oppenheimer *v.* Clemmons, 18 F. R. 886.

his compensation was fixed at half the net proceeds over the agreed value of the cattle, this did not create a partnership between them.[1]

So where an owner of a farm lets it on half profits, the landlord and tenant certainly are not partners ; (*y*) for if we suppose the tenant should go into great expense for some new mode of cultivation, and become insolvent, no one would think of calling on the landlord as liable on the tenant's contracts. So, in the very common case of shipments on half profits, it is never supposed that such a shipment makes a partnership between the shipper and ship-owner ; (*z*) and the same principle has been applied where one

(*y*) Perrine *v*. Hankinson, 6 Halst. 181. Here, the profits of a tavern, as well as of a farm, were to be divided. Putnam *v*. Wise, 1 Hill, 234 ; Blue *v*. Leathers, 15 Ill. 31 ; Chase *v*. Barrett, 4 Paige, 148. The lease of a ferry has been considered analogous to a farming lease, and a stipulation by which the lessee thereof was to divide with the lessor all the profits above a certain amount was held not to make the lessor and lessee liable as partners. Bowyer *v*. Anderson, 2 Leigh, 550. So, when coal mines were leased. Heckert *v*. Fegely, 6 W. & S. 139, 143. In Tibbatts *v*. Tibbatts, 6 McLean, 80, John W. Tibbatts, and Ann Tibbatts, his wife, leased unto Leo Tibbatts a stock farm under covenants and conditions substantially as follows : The said Leo to pay no rents during the term of the lease, and to manage and conduct the business of the farm in accordance with his own judgment ; the stock and farming utensils on the farm at the time of the lease to be fairly valued, and at the end thereof to be accounted back in equal value ; Leo to have one-third, and John W. Tibbatts and wife two-thirds, of the net profits to accrue by the same, and current expenses to be paid out of the general stock funds of the concern. The real estate tax was to be paid by John W. Tibbatts, and six per cent. interest to be allowed on all advances made by either of the parties. Leo was to keep regular accounts of the business of the farm, subject at all times to the inspection of John W. Tibbatts and wife ; and, in case of Leo Tibbatts's death during the term of the lease, peaceable possession was to be given to John W. Tibbatts and wife. The court held, that "looking at the nature of the above contract, and the language used by the parties, there was less difficulty in considering it a partnership agreement, than a mere lease for the term specified, paying rent." See also Brownlee *v*. Allen, 21 Mo. 123 ; Allen *v*. Davis, 13 Ark. 28.

(*z*) Rice *v*. Austin, 17 Mass. 205, 206. So a contract by which the owner of a vessel lets her in consideration of a share of her earnings, or of the proceeds of the adventure, does not make the ship-owner and the charterer partners. Reynolds *v*. Toppan, 15 Mass. 370 ; Taggard *v*. Loring, 16 Mass. 336 ; Thompson *v*. Snow, 4 Me. 264 ; Winsor *v*. Cutts, 7 Me. 261 ; Cutler *v*. Winsor, 6 Pick. 335. See Cox *v*. Delano, 3 Dev. 89. In French *v*. Price, 24 Pick. 13, the defendants were subscribers of a contract by which they agreed to become interested in a voyage and adventure, in certain definite proportions. They also, by the same instrument, appointed two of their number to manage the business abroad, who were to receive a commission and monthly wages as compensation for their services, and two others to manage the business in this country, purchase a suitable cargo, &c., and to be allowed to charge two and a half per cent. on the amount of invoice and profits, and the same on all returns, but no commission for purchase or sale of vessel. They thereby also ratified the purchase of a vessel, which had been made by the home agents. Upon the question whether this agreement

[1] **Wish *v*. Small, 1 Camp. 331 ; Beckwith *v*. Talbot, 2 Col. 639, 95 U. S. 289.**

advanced money to buy goods, and consigned them, to be repaid out of the goods, and to have a part of the net profits. (*a*)

§ 72. **Annuitant.** — A person may be in receipt of a sum from the profits of a partnership, without being chargeable as a partner, when one is entitled to an annuity from the firm. This happens most frequently in the case of a retiring partner, who as a part of his several property, or instead of some portion of his share in the partnership property which he leaves behind, is to receive an annuity for life, or for a certain number of years. This may occur also by the bequest of a deceased partner, who leaves his funds or a part of them in the firm, and gives an annuity to his widow or some other person out of the profits. It is agreed that if this annuity be certain, and in no way dependent on the amount of the profits, although payable out of them, then the annuitant is not a partner. (*b*) According to the case of Waugh *v.* Carver, an annuity which took the form of a share of the profits would make

made the signers thereof partners, Morton, J., said: "Similar transactions and enterprises are very common in our country; and I believe, among merchants, never are considered or treated as partnerships. Many cases occur in which it may be extremely difficult to determine whether the joint-owners of property hold it as partners or as tenants in common. The case at bar may be one of them. But although the connection between the owners of the plant and cargo certainly contains many of the ingredients and properties of a partnership, yet, speaking for myself, I must say that in my opinion it does not come up to that relation. The case of Thorndike *v.* De Wolf & Tr., 6 Pick. 121, bears some resemblance to this; and that of Jackson *v.* Robinson, 3 Mason, 138, seems to me decisive."

(*a*) In Rice *v.* Austin, 17 Mass. 197, Putnam, J., said: "So in the case of shipments to India upon half-profits, so generally practised in this country: it would hardly be contended that the numerous freighters, often unknown to each other, have by such shipments become answerable for each other, or in any way interested as partners with the ship-owner, in respect to the dollars, which constitute the adventures, and which he undertook to carry to India for half the profits. . . . The resemblance between the cases now mentioned and the case at bar is very strong. The plaintiff advanced his funds to be invested by Lindsay in live oak in Florida, to be procured, cut, and transported, at the expense of Lindsay, but on the account and risk of the plaintiff, to the navy-yards of the United States; and for the services and disbursements of Lindsay, he was to have half the profits, as the owners of the freighting ships to India are compensated for their services and disbursements; and the plaintiff, for his risks and advances, was to have his principal sum repaid, and the residue of the profits. But it has never been thought that the return cargo was liable for the debts of the ship-owner."

(*b*) See Young *v.* Axtell, 2 H. Bl. 243. In Waugh *v.* Carver, 2 H. Bl. 235, Lord C. J. Eyre says: "This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, Whether by construing this to be a partnership, we should not determine that if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable for the debts of the house, and involve her in a bankruptcy? But I think this case will not lead to that conclusion."

the annuitant a partner.[1] But according to the better doctrine, if the proportional part of the profits is received by one who is simply an annuitant, this does not make him a partner.[2]

§ 73. **Assignee for Benefit of Creditors.** — If two or more creditors take an assignment of their debtor's stock in trade, and agree together and with him to carry on the business under the management of the debtor himself or of a creditor and apply the profits to the payment of their debts due them, this does not of itself make them partners in the business.[3]

§ 74. **Executor.** — When an executor of a partner, by reason of directions in the will or otherwise, takes part with the surviving partners in carrying on the business, he becomes a partner.[4] But if he merely leaves the interest of the testator in the business, receiving a share of the profits but taking no part in the business, he is not a partner.[5]

§ 75. **Association of Carriers.** — A traffic arrangement between carriers, by which a through line is established and a through rate agreed upon, to be divided in certain proportions, does not create a partnership.[6] This is clear, for there was no intention to create a new body to operate the through line; each carrier was to operate his own line. But if the carriers intend to create a new

[1] *In re* Colbeck, Buck, 48; *Ex parte* Wheeler, Buck, 25; *Ex parte* Chuck, 8 Bing. 469. See opinion of Master of Rolls, *In re* Stanton Iron Co., 21 Beav. 164.

[2] Jones *v.* Walker, 103 U. S. 444.

[3] Cox *v.* Hickman, 8 H. L. C. 268; *Re* English Society, 1 H. & M. 85; Holme *v.* Hammond, L. R. 7 Ex. 218; Davis *v.* Patrick, 122 U. S. 138; Pettis *v.* Atkins, 60 Ill. 454; Purvis *v.* Butler, 87 Mich. 248, 49 N. W. 564; Brundred *v.* Muzzy, 1 Dutch. 268; U. S. Ins. Co. *v.* Scott, 1 Johns. 106; Righter *v.* Farrel, 134 Pa. 482, 19 Atl. 687. But see Owen *v.* Body, 5 A. & E. 28; Taylor *v.* Herring, 10 Bosw. 447. Compare Cavanaugh *v.* Riley, (Ky.) 19 S. W. 745.

[4] Mattison *v.* Farnham, 44 Minn. 95, 46 N. W. 347; Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305; Wild *v.* Davenport, 48 N. J. 129, 7 Atl. 295; Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705.

[5] Holme *v.* Hammond, L. R. 7 Ex. 218; Owens *v.* Mackall, 33 Md. 382; Phillips *v.* Blatchford, 137 Mass. 510; Avery *v.* Myers, 60 Miss. 367; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295; Richter *v.* Poppenhausen, 42 N. Y. 373; Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705.

Before the case of Cox *v.* Hickman the English decisions held the executor liable as partner, since he received a share of the profits. Wightman *v.* Townroe, 1 M. & S. 412; *Ex parte* Garland, 10 Ves. 110; *Ex parte* Holdsworth, 1 Mont. D. & D. 475.

[6] Insurance Co. *v.* Railroad, 104 U. S. 146; Citizens' Ins. Co. *v.* Kountz Line, 4 Woods, 268; Montgomery & E. Ry. *v.* Culver, 75 Ala. 587; Hot Springs R. R. *v.* Trippe, 42 Ark. 465; Converse *v.* Norwich & N. Y. Tr. Co., 33 Conn. 166; Irvin *v.* Nashville, C. & S. L. Ry., 92 Ill. 103; Atchison, T. & S. F. R. R. *v.* Roach, 35 Kas. 740, 12 Pac. 93; Darling *v.* Boston & C. R. R., 11 All. 295; Gass *v.* N. Y. P. & B. R. R., 99 Mass. 220; Wetmore *v.* Baker, 9 Johns. 307; Merrick *v.* Gordon, 20 N. Y. 93. But see Cincinnati, H. & D. R. R. *v.* Spratt, 2 Duv. 4; Barter *v.* Wheeler, 49 N. H. 9.

body to operate the line, they become partners. Thus where the owners of several steamboats united to establish a line of steamboats and divide the profits, they were held partners, though each owner retained the title and control of his own boat.[1] But if in such cases the carriers do not own the profits resulting from the whole road, as a common fund out of which each is entitled to draw a certain share, but each one of them receives only those profits and bears only those losses which accrue from his own particular piece of road, there is now no such community of interest between them as to make them partners,[2] even though the carrier making the most profit divides the excess.[3] The carriers in such cases may however be jointly liable, not by reason of a partnership, but because the agent for whose act suit was brought acted for them jointly.[4]

§ 76. **Ownership in Common.** — Partnership must be distinguished from the joint management of property owned in common. Where two parties own a chattel and make a profit by the use of it, they are not partners without some special agreement which makes them so. Thus the joint owners of vessels are not partners in the management of the vessels,[5] unless they form a special partnership association.[6]

So where two men agreed to share the expense of getting a patent, and to be "equal partners" in all losses and expenses, and in gains and profits it was held not to constitute a partnership.[7]

[1] Waland *v.* Elkins, 1 Stark. 272; Bowas *v.* Pioneer Tow Line, 2 Sawy. 21; Meaher *v.* Cox, 37 Ala. 201; Connolly *v.* Davidson, 15 Minn. 519; Champion *v.* Bostwick, 18 Wend. 175.

[2] Ellsworth *v.* Tartt, 26 Ala. 733; Mohawk & Hudson R. R. Co. *v.* Niles, 3 Hill, 162; Briggs *v.* Vanderbilt, 19 Barb. 222; Bonsteel *v.* Vanderbilt, 21 Barb. 26; Pattison *v.* Blanchard, 5 N. Y. 186.

[3] Fay *v.* Davidson, 13 Minn. 523.

[4] Cobb *v.* Abbot, 14 Pick. 289.

[5] Watson on Part. 5, 6; Ersk. Inst. b. 3, tit. 3, § 18; 2 Bell Comm. 655 (5th ed.); *Ex parte* Young, 2 V. & B. 242 (overruling Doddington *v.* Hallet, 1 Ves. Sr. 497); *Ex parte* Harrison, 2 Rose, 76; Green *v.* Briggs, 6 Hare, 395; Jackson *v.* Robinson, 3 Mas. 138; The Daniel Kaine, 35 F. R. 785; Patterson *v.* Chalmers, 7 B. Mon. 595; Harding *v.* Foxcroft, 6 Me. 76; Knowlton *v.* Reed, 38 Me. 246: Lamb *v.* Durant, 12 Mass. 54; Thorndike *v.* De Wolf, 6 Pick. 120; French *v.* Price, 24 Pick. 13, 18, 19; Runnels *v.* Moffat, 73 Mich. 188, 41 N. W. 224; Ward *v.* Bodeman, 1 Mo. App. 272; Porter *v.* McClure, 15 Wend. 187; Knox *v.* Campbell, 1 Barr, 366; Hopkins *v.* Forsyth, 14 Pa. 34; Adams *v.* Carroll, 85 Pa. 209.

[6] Holderness *v.* Shackels, 8 B. & C. 612, 618; Macy *v.* De Wolf, 3 W. & M. 193; Hendy *v.* March, 75 Cal. 566, 17 Pac. 702; Hewitt *v.* Sturdevant, 4 B. Mon. 453; Patterson *v.* Chalmers, 7 B. Mon. 595; Hardy *v.* Sproule, 29 Me. 258; Gardner *v.* Cleveland, 9 Pick. 334; Bulfinch *v.* Winchenbach, 3 All. 161; Hinton *v.* Law, 10 Mo. 701; Mumford *v.* Nicoll, 20 Johns. 611 (reversing Nicoll *v.* Mumford, 4 Johns. Ch. 522); King *v.* Lowry, 20 Barb. 532. See Merritt *v.* Walsh, 32 N. Y. 685.

[7] Fraser *v.* Gates, 118 Ill. 99, 1 N. E. 817.

But it is possible to form a partnership association, of which the contemplated patent shall constitute the capital.[1] In the same way joint owners of a patent are not necessarily partners, though they may by agreement become so.[2] In French *v.* Styring [3] two joint owners of a race-horse had entered into an arrangement by which one of them had the entire management of the horse, and paid in advance all the expenses of keeping, training, &c. The other co-owner was to pay a moiety of these expenses, and to share equally in the earnings. One of the questions raised in the case was, whether that agreement constituted a partnership. On this question the court was divided; but since they allowed the plaintiff to recover, the necessary result of the case would seem to be that no partnership existed. This is without doubt the true view.

§ 77. **Joint Legatees.** — Where property is left to two or more persons by a will, in such a way that they would take it as joint tenants, or as tenants in common, and they take it as partners, and continue to hold and use it as partnership stock, their rights to and in the property, and against each other in relation to the property, are governed by the law of partnership. (*c*) To this it may be said, by way of exception, that if the will contained distinct expressions which would give to the property the quality of joint-tenancy, even when it should be held in partnership, these words, in reference to the legatees, would take effect. (*d*)

(*c*) Jackson *v.* Jackson, 7 Ves. 535. Same case on appeal, 9 Ves. 591. In this case, personal property, including leaseholds, property in trade, &c., was left to A. & B., as residuary legatees. By both the Master of the Rolls, and the Lord Chancellor on appeal, it was held, that they took it originally as joint-tenants. But the Master thought the bequest positive, and that there were no circumstances by which he could be guided in giving to the words of the will any other than their literal import. Therefore he decreed that, on the death of A., all the property thus bequeathed, excepting a portion of the accrued profits, belonged to B., the survivor. The Lord Chancellor, on the other hand, held, that the will had, neither from the obvious intention, the purposes to which the testator had devoted his property, nor from any other consideration, gone the length of providing that the residuary legatees should not have any power of destroying the original joint-tenancy by their acts and agreements. A. & B. then possessing the power of severing the joint-tenancy, he held, that they had exercised it, both as to the capital and the profits, by acting for twelve years as partners in trade therein; and that, therefore, they were to be considered as tenants in common of the property embarked in trade, from the time they were let into possession. See 2 Hov. Supp. 66.

(*d*) As where a testator, after making considerable pecuniary and other legacies, without making any express disposition of the residue of his personal estate, con-

[1] Somerby *v.* Buntin, 118 Mass. 279.

[2] Parkhurst *v.* Kinsman, 1 Blatch. 488; Boeklen *v.* Hardenburgh, 37 N. Y. Super. 110; Penniman *v.* Munson, 26 Vt. 164.

[3] 2 C. B. N. S. 357. See also Hawes *v.* Tillinghast, 1 Gray, 289.

§ 78. **Proof of Partnership.** — When joint defendants are sued as partners, the burden is on the plaintiff to prove them so.[1] Partnership may be proved as well by circumstantial evidence as by direct proof;[2] but general reputation is not evidence of partnership,[3] or of its dissolution,[4] though if a partnership is proved, general reputation is admissible to prove whether or not a particular partner is dormant or active,[5] and it would seem that a disinterested person may testify who compose a firm.[6]

A member of a firm may of course testify who his partners are;[7] though if the agreement is proved, one party to it cannot testify that the other party is his partner, since that is a question of law rather than of fact.[8] So the existence of a partnership may be proved by the separate admissions of all who are sued; or by the acts, declarations, and conduct of the parties; or by the act of one, and the declarations or conduct of others;[9] and one who admits that he is partner in a business may be held liable personally, on his admission.[10] But the declaration of one who

stituted his two eldest sons his executors. Though the executors had carried on trade together with a portion of the residue, it was, nevertheless, held, that, upon the death of one of them, the whole of the residuum survived to the other. Hall *v.* Digby, 4 Bro. P. C. 224. In 9 Ves. 596, the Lord Chancellor thus states the principle upon which the case was decided: "In that case Mr. Fazakerley, Sir John Strange, and the other considerable persons who signed the reasons upon the appeal, all agreed that actual dealing in partnership with effects left to two jointly, with intent that it should be a dealing in partnership, though they had taken under the will as joint-tenants, yet having once begun to act with the property as merchants, would sever the joint-tenancy, unless the will contains something that would clothe the property, though engaged in trade, with the quality of joint-tenancy."

[1] Eichel *v.* Sawyer, 44 F. R. 845; Lieb *v.* Craddock, 87 Ky. 525, 9 S. W. 838; Hallstead *v.* Coleman, 143 Pa. 352, 22 Atl. 977.

[2] McEvoy *v.* Bock, 37 Minn. 402, 34 N. W. 740; Rogers *v.* Murray, 110 N. Y. 658, 18 N. E. 261.

[3] Metcalf *v.* Officer, 2 F. R. 640; Marble *v.* Lypes, 82 Ala. 322, 2 So. 701; Tanner & Delaney Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584; Campbell *v.* Hastings, 29 Ark. 512; Bowen *v.* Rutherford, 60 Ill. 41; Sager *v.* Tupper, 38 Mich. 258; Smith *v.* Griffith, 3 Hill, 333; Adams *v.* Morrison, 113 N. Y. 152, 20 N. E. 829; Wallis *v.* Wood, (Tex.) 7 S. W. 852; Emberson *v.* McKenna, (Tex.) 16 S. W. 419.

[4] Pitcher *v.* Barrows, 17 Pick. 361.

[5] Metcalf *v.* Officer, 2 F. R. 640.

[6] Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

[7] First Nat. Bank of Wausau *v.* Conway, 67 Wis. 210, 30 N. W. 215.

[8] Alexander *v.* Handley, (Ala.) 11 So. 390.

[9] Jennings *v.* Estes, 16 Me. 323; Welsh *v.* Speakman, 8 W. & S. 257; Haughey *v.* Strickler, 2 W. & S. 411; Johnston *v.* Warden, 3 Watts, 101; Cornhauser *v.* Roberts, 75 Wis. 554, 44 N. W. 744.

[10] In Sangster *v.* Mazarredo, 1 Stark. 161, where the action was assumpsit against four as the acceptors of bills of exchange, three of whom resided abroad and had been outlawed, it was held, that an admission of partnership by one was evidence as against

claims to be partner in a business is not admissible against another to prove him a copartner.[1] So the books of a firm cannot be admitted to prove one a partner in the firm. (*e*)

(*e*) [Bryce *v.* Joynt, 63 Cal. 375.] So it seems to be settled, as a general rule, that a plaintiff cannot prove the partnership of those whom he had made defendants, by the admissions of one of them made in his answer filed to a bill in equity against him. Rooth *v.* Quin, 7 Price, 193; Field *v.* Holland, 6 Cranch, 8, 24; Van Reimsdyk *v.* Kane, 1 Gall. 630, 635; Clark *v.* Van Reimsdyk, 9 Cranch, 153, 156; Osborn *v.* U. S. Bank, 9 Wheat. 788, 832; Christie *v.* Bishop, 1 Barb. Ch. 105, 116; Chapin *v.* Coleman, 11 Pick. 331. See Studdy *v.* Sanders, 2 D. & R. 347; Pritchard *v.* Draper, 1 Russ. & M. 191; Bevans *v.* Sullivan, 4 Gill, 383.

It was held in one case, Whately *v.* Manhim, 2 Esp. 608, that in an action by A. against B. & C. as partners, A. might establish the partnership by putting in evidence a verdict on an issue between B. & C. directed out of a court of equity, to try whether they were part-

that one of a joint promise by the four; since, in a future action by the present defendant against his co-defendants for contribution, the record in the present case would not be sufficient evidence of the joint liability. See Ellis *v.* Watson, 2 Stark. 453, 478. But an admission by one that he is a partner with others is to be construed with reference to the circumstances under which it is made, and, if fairly applicable only to a single transaction, will not be sufficient to establish a general partnership. De Berkom *v.* Smith, 1 Esp. 29. See Ridgway *v.* Philip, 1 Cr., M. & R. 415. Where the issue of partnership was raised by a plea in abatement for the non-joinder of parties as defendants, the admission of liability as a partner by one not joined in the suit, being good in an action against him, was held to be also receivable on this issue to prove him a partner. 2 Greenl. Ev. § 484; Clay *v.* Lanslow, 1 Moody & M. 45.

[1] Mont *v.* Mainwaring, 8 Taunt. 139; Burgue *v.* Firmin, 3 Stark. 53; Ditchburn *v.* Spracklin, 5 Esp. 31; Tinkler *v.* Walpole, 14 East, 226; Gibbons *v.* Wilcox, 2 Stark. 43; Parker *v.* Brewer, 3 J. B. Moore, 226 (see Evans *v.* Drummond, 4 Esp. 89, 91; Heath *v.* Sansom, 4 B. & Ad. 172, 175); Oppenheimer *v.* Clemmons, 18 F. R. 886; Cross *v.* Langley, 50 Ala. 8; Humes *v.* O'Bryan, 74 Ala. 64; Vanderhurst *v.* De Witt, 95 Cal. 57, 30 Pac. 94; Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330; Gilpin *v.* Temple, 4 Harr. 1, 90; McCutchin *v.* Bankston, 2 Ga. 244; Tumlin *v.* Goldsmith, 40 Ga. 221; Flournoy *v.* Williams, 68 Ga. 707; Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19; Southwick *v.* McGovern, 28 Ia. 533; Degan *v.* Singer, 41 Ill. 28; Gardner *v.* North-Western Co., 52 Ill. 367; Vannoy *v.* Klein, 122 Ind. 416, 23 N. E. 526; Evans *v.* Corriell, 1 Greene (Ia.) 25; Brown *v.* Rains, 53 Ia. 81, 4 N. W. 867; Phillips *v.* Purington, 15 Me. 425; Tuttle *v.* Cooper, 5 Pick. 414; Bridge *v.* Gray, 14 Pick. 55; Ostrom *v.* Jacobs, 9 Met. 454; Allcott *v.* Strong, 9 Cush. 323; McNamara *v.* Eustis, 46 Minn. 311, 48 N. W. 1123; Boyd *v.* Ricketts, 60 Miss. 62; Filley *v.* McHenry, 71 Mo. 417; Rimel *v.* Hayes, 83 Mo. 200; Converse *v.* Shambaugh, 4 Neb. 376; Grafton Bank *v.* Moore, 13 N. H. 99; Flanagin *v.* Champion, 1 Green Ch. 51; Whitney *v.* Ferris, 10 Johns. 66; Whitney *v.* Sterling, 14 Johns. 215; McPherson *v.* Rathbone, 7 Wend. 216; Mitchell *v.* Roulstone, 2 Hall, 351; Fenn *v.* Timpson, 4 E. D. Smith, 276; Kirby *v.* Hewitt, 26 Barb. 607; Henry *v.* Willard, 73 N. C. 35; Carson *v.* Gillitt (N. D.), 50 N. W. 710; Cowan *v.* Kinney, 33 Oh. St. 422; Taylor *v.* Henderson, 17 S. & R. 453; Nelson *v.* Lloyd, 9 Watts, 22; Anderson *v.* Levan, 1 W. & S. 334; Crossgrove *v.* Himmelrich, 54 Pa. 203; Edwards *v.* Tracy, 62 Pa. 374; Vanzant *v.* Kay, 2 Humph. 106; Buzard *v.* Jolly (Tex.) 6 S. W. 422; Wallis *v.* Wood (Tex.) 7 S. W. 852; Emberson *v.* McKenna, (Tex.) 16 S. W. 419; Bundy *v.* Bruce, 61 Vt. 619, 17 Atl. 796; First Nat. Bank of Wausau *v.* Conway, 67 Wis. 210, 30 N. W. 215; Strong *v.* Smith, 62 Conn. 39, 25 Atl. 395.

Whatever be the evidence offered to prove a partnership, it is said that parties denying it cannot give evidence of private conversation or correspondence to rebut that evidence. (*ee*)

§ 79. **Partnership in several distinct Firms.** — There is nothing to prevent the same person from being a partner in several distinct firms. (*f*) This may involve difficult questions of fact, or perhaps of law, arising from the complication of interests, especially in case of bankruptcy. (*g*) Some of these questions we shall hereafter consider, when we treat of bankruptcy and the settlement of a partnership estate. It seems, however, not only that a member of one partnership may become a member of another, but a member of one firm may enter into such a bargain with a third party, in respect to the interest of the first in the stock, business, or profits of his partnership, as shall constitute this third person and himself partners as to the interest of the first, although the partnerships are entirely distinct, the new from the old, and the third person acquires no rights and incurs no obligations in reference to the first partnership. (*h*) If the new

ners. But this case has been questioned, by high authority, for reasons that seem entirely conclusive. 2 Stark. Ev. (7th Am. ed.) 808, n. And in Burgess *v.* Lane, 3 Me. 65, it was held, that a verdict and judgment thereon can be admissible evidence of a copartnership in another action, only when both the parties to the second suit are the same as the parties to the first. See Fogg *v.* Greene, 16 Me. 282; Ellis *v.* Jameson, 17 Me. 235; Cragin *v.* Carleton, 21 Me. 492; Latham *v.* Kenniston, 13 N. H. 203. See Folk *v.* Wilson, 21 Md. 538.

(*ee*) Freeman *v.* Smith, 2 Wall. 160.

(*f*) Swan *v.* Steele, 7 East, 210; Bosanquet *v.* Wray, 1 B. & C. 597; Elderkin *v.* Winne, 1 Chand. 27.

(*g*) See *post*, § 200; and Steele *v.* Stuart, L. R. 2 Eq. 84.

(*h*) To this effect is the language of Eyre, C. J., in Bolton *v.* Puller, 1 B. & P. 546: "There can be no doubt that, as between themselves, a partnership may have transactions with an individual partner, or with two or more of the partners having their separate estate engaged in some joint concern in which the general partnership is not interested; and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *e converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers; for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership. In some respects, therefore, an individual partner, or a particular partnership consisting of two or more of those persons who are partners in some larger partnership, may be considered as third persons in transactions in which the general partnership may happen to be engaged with their correspondent." The court proceeded upon the same principle in Brown *v.* De Tastet, Jac. 284. There A., B., and C. being in partnership, A. agreed with D. to give him a moiety of his share in the firm. It was held that an account might be decreed between A. and D. without making B. and C. parties. See Glassington *v.* Thwaites, 1 Sim. & S. 124. In *Ex parte* Barrow, 2 Rose, 255, the two Slyths, father and

partnership becomes insolvent, it would affect the old partnership only as the insolvency of any member thereof would. (*i*) If a person belongs to two firms, he may transfer to the credit of one of them his interest in the other, against the wishes of his partners in the second firm; nor would this necessarily operate a dissolution of the second firm. (*j*) But it is so obvious that such complicated arrangements may bring upon the parties great inconvenience and embarrassment, that they will continue to be very rare, even if they take place at all.

son, were in partnership. They agreed to dissolve; that the affairs of the partnership should be settled by arbitration; and that Slyth the younger should have one-third out of the profits of the business, until some situation should be found for him. The affairs of the partnership were never adjusted; but, shortly after, Slyth the elder, who remained in possession of the effects of the firm, formed a new partnership with Gyles. A commission of bankruptcy having issued against the two Slyths, their assignees took possession of the effects of Slyth and Gyles, to an amount more than sufficient to pay the creditors of that firm. The question in the present case was to whom the surplus belonged, whether to the joint creditors of Slyth the elder and Slyth the younger, or to the separate creditors of Slyth the elder. The court held that it was the separate property of Slyth the elder. Lord Chancellor Eldon, in the course of his opinion, said: "Now Slyth the son was no partner in this (the new) partnership; for although Slyth the father might be obliged to give one-third of his profits to Slyth the son under this arrangement, yet I take it to have been long since clearly established, that a man may become a partner with A., where A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out of the firm of Raymond & Co. But it was held that he was no partner in that partnership, had no demand against it, had no account in it, and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond." See Freligh *v.* Miller, 16 La. Ann. 418.

(*i*) See preceding note.

(*j*) Russell *v.* Leland, 12 All. 349.

CHAPTER VI.

WHO ARE LIABLE AS PARTNERS AS TO THIRD PARTIES.

§ 80. **General Grounds of Liability.** — As we have seen that it is one of the essential qualities of partnership that upon each partner rests an absolute liability for the whole amount of every debt due from the partnership, it is of the utmost consequence, both to the creditors of a partnership and to actual or alleged members of it, to determine with certainty who they are upon whom this liability rests; or, in other words, who are partners in respect to third parties dealing with the firm. And this question is sometimes as difficult as it is important. It is certain that persons may be held as partners as to third parties, who would not be deemed partners as between themselves. (*aa*)

The first thing to be remembered is, that persons may be charged as partners of a firm on either one of two perfectly distinct grounds, to both of which we have already referred. One of these is, that the person actually is a partner. The other is, that he has, with his own knowledge and consent, been held forth as a partner, to the person having a claim, or to the public generally. In the great majority of cases these two causes unite; that is, he is held forth as a partner who actually is one. The secret partner, on the one hand, or the merely nominal partner, on the other, are exceptions to the prevailing custom; but such exceptions do occur, and not very unfrequently: and then the question is, What are the rules of law in regard to them?

The first which we state is, that the liability of a partner is fastened upon any person just as absolutely, and to all intents and purposes, by either one of these causes alone, as by both of them together. And the reason is obvious. If a man is in fact a partner in a mercantile or other partnership, the mere circumstance

(*aa*) Grieff *v.* Boudousquie, 18 La. An. 631. A person may be so negligent as to be estopped to deny that a person who is managing his property is acting by his authority, and may be held as partner, even though there be no community of interest or participation in profits. *In re* Jewett, 15 N. B. R. 126.

that he has been able to conceal this partnership from the world affords no reason whatever why he should not share in the liabilities of the known partners. (*a*)

(*a*) That one who is a partner in fact, though not known to be so, is liable upon all the partnership engagements to the same extent as though his name had never been concealed, is one of the oldest and best-established doctrines of partnership law. In Hoare *v.* Dawes, 2 Doug. 371, Lord Mansfield said: "I considered them at first as a sort of dormant partners. The law with respect to them is not disputed, namely, that they are liable when discovered, because they would otherwise receive usurious interest without risk." And in Saville *v.* Robertson, 4 T. R. 725, Lord Kenyon, C. J., said: "It is clear that if all these parties had been partners at the time when these goods were furnished, though that circumstance were not known to the plaintiff, they would all have been liable for the value of the goods. It is equally clear that such an action might be maintained against the dormant partners alone, unless they pleaded in abatement." Coope *v.* Eyre, 1 H. Bl. 48; Gouthwaite *v.* Duckworth, 12 East, 421; Swan *v.* Steele, 7 East, 210; *Ex parte* Raleigh, 3 Mont. & Ayr. 670; Evans *v.* Drummond, 4 Esp. 89; *Ex parte* Gellar, 1 Rose, 297; Dyke *v.* Brewer, 2 C. & K. 828. The whole doctrine on the subject is thus stated by Marshall, C. J., in Winship *v.* Bank of the United States, 5 Pet. 561: "Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of them is, that a man who shares in the profits, although his name may not be in the firm, is responsible for all its debts. Another more applicable to the subject under consideration is, that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and, consequently, to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company; and every person with whom he trades, in the way of its business, has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and, if it do so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general power contained in all partnerships. The acting partners are identified with the company, and have a right to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law. See Richardson *v.* Farmer, 36 Mo. 35.

"The counsel for the plaintiff in error supposes that, though these principles may be applicable to an open avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could there would be a difference between the responsibility of a dormant partner and one whose name was to the articles. But their responsibility, in all partnership transactions, is admitted to be the same. Those who trade with a firm on the credit of individuals whom

§ 81. **Liability of Secret Partner.** — A secret partner is therefore liable upon all the acting partner's contracts made within the usual scope of the partnership business,[1] whether such contracts are *really* on partnership account or not. It might perhaps be said, that as no credit is given to the secret partner, and as his liability is wholly founded upon his interest, if it were shown that in fact he had no interest in a particular transaction, he ought not to be bound with reference to it, even though it were apparently within the regular course of the business carried on by the partnership. And there are cases in which the court seems to adopt this view. But the rule above stated rests upon the better reason and the stronger authority. (*b*) It has been held that a

they believe to be members of it take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners, who were not ostensible, are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea that, if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles." s. c. 5 Mason, 176; Armstrong *v.* Hussy, 12 S. & R. 315; Mifflin *v.* Smith, 17 S. & R. 165; Graeff *v.* Hitchman, 5 Watts, 454; Given *v.* Albert, 5 W. & S. 333; Bisel *v.* Hobbs, 6 Blackf. 479; Braches *v.* Anderson, 14 Mo. 441; Church *v.* Sparrow, 5 Wend. 223; Baxter *v.* Clark, 4 Ired. 127; Everitt *v.* Chapman, 6 Conn. 347; Reynolds *v.* Cleveland, 4 Cow. 282; Kelley *v.* Hurlburt, 5 Cow. 534; *In re* Warren, 2 Ware ( ), Davies, 324; Hadfield *v.* Jameson, 2 Munf. 66; Grosvenor *v.* Lloyd, 1 Met. 19; McDonald *v.* Millandon, 5 La. 406, 408; Lea *v.* Guice, 13 S. & M. 656; Smith *v.* Smith, 27 N. H. 244; Brooke *v.* Washington, 8 Gratt. 248; Hill *v.* Voorhies, 22 Pa. 680; Griffith *v.* Buffum, 22 Vt. 181; Pratt *v.* Langdon, 12 Allen, 544. [Callender *v.* Robinson, 96 Pa. 454; Gavin *v.* Walker, 14 Lea, 643.] A secret partner cannot avoid his liability to creditors by showing that, according to the law of the place where it was made, the contract of partnership as between the parties was void. Oakley *v.* Aspinwall, 2 Sandf. 7. [Where a business is carried on by an ostensible sole trader, and he borrows money for the business, his secret partner is liable, though the money was misused. Gavin *v.* Walker, 14 Lea, 643.]

(*b*) In Etheridge *v.* Binney, 9 Pick. 272, where the two Binneys and John Winship carried on the manufacture of soap and candles in partnership, but in the name of John Winship alone, the principal question in the case being whether the Binneys were liable for moneys borrowed by Winship, the court instructed the jury that "the name of the firm here being only the name of the individual, a note offered in that name, unaccompanied by any representation, would of course import only a promise of John Winship alone; and the credit being given to him alone, the creditor would not recover against the firm, without proving that the money actually went into the funds of the firm. But if the borrowing partner states that he is one of a company, and that he borrows money for the company, or purchases goods for their use, then, as there is such company, and as they have given him authority to use the company credit to a certain extent, and as the creditor will have no means of knowing whether he is acting honestly towards his associates or otherwise, and he lends the money or sells the goods on the faith of such representation, the company will be bound, unless they prove that the contract was for his private benefit, and known to be so by the

[1] Reab *v.* Pool, 30 S. C. 140, 8 S. E. 703.

judgment obtained against an ostensible partner, upon a note given by him in his own name in the course of the partnership business,

creditor." When two persons, under a private agreement, become partners as to third parties, the contract specifying no firm name, but allowing each partner to purchase goods on his own individual credit, — one to transact the business, and the other to be unknown, — the dormant partner is not liable on a note for goods put into the concern by the other, and by him signed in his own name; the signature not being intended as the firm signature, and the payee not having reason to suppose it to be such. Palmer *v.* Elliot, 1 Clif. 63. See also Mercantile Bk. *v.* Cox, 38 Me. 500. But see Hendrick *v.* Gunn, 35 Ga. 234. In Lloyd *v.* Ashby, 2 C. & P. 138, assumpsit was brought on a bill of exchange, accepted by "Ashby & Rowland." The question was whether Shaw, a dormant partner with Ashby & Rowland, was liable on the above acceptance. Shaw was not known as a partner, nor did his name appear in the partnership transactions. The bill in question was accepted in a matter having no relation to the partnership business. Abbott, C. J.: "If Shaw had been known to be a partner, I should have held that it was taken on his credit; and that, unless there was fraud in the plaintiff, he would be entitled to recover on it against Shaw; but as the plaintiff did not know that Shaw was a partner, and as he could not have taken the bill on Shaw's credit, I am of the opinion that the plaintiff cannot recover. I ground myself on these circumstances, that Mr. Shaw was an unknown partner, and that the bill was not accepted for a debt from him, but for the raising of money from which he had no benefit." See also Young *v.* Hunter, 4 Taunt. 583, opinion of Gibbs, J.: *Ex parte* Bolitho, Buck, 100. See Miller *v.* Maince, 6 Hill, 114. But the doctrine of these decisions is certainly controverted by better considered and more weighty adjudications. Lloyd *v.* Ashby, *supra*, was afterwards reconsidered in the King's Bench; and the court were of opinion that the plaintiff was entitled to recover, and a new trial was granted. 2 B. & Ald. 23. The principle of the decision in Vere *v.* Ashby, 10 B. & C. 288, is the same with that in 2 B. & Ald. 23; and in Wintle *v.* Crowther, 1 C. & G. 316, Bayley, B., referring to the above cases, said: "Notwithstanding these cases, we are of opinion, that when a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached." See Nichols *v.* Cheairs, 4 Sneed, 229. In Ross *v.* Decy, 2 Esp. 469, the action was for goods sold and delivered; plea set off. The plaintiffs entered into partnership as grocers, Ross to keep the shop in his own name only. He sold to the defendant the goods for the price of which the present action was brought. The defendant had done business for Ross on his separate account to a greater amount than the demand now made against him by the partnership; and this he offered to set off. Lord Kenyon was of opinion that the set-off was good. His lordship said, the plaintiffs had subjected themselves to it, by holding out false colors to the world, by permitting Ross to appear as the sole owner; that it was possible the defendant would not have trusted Ross only, if he had not considered the debt due to himself as a security against the counter demand. Furthermore, not only is a secret partner bound by all transactions within the scope of the partnership business, whether on partnership account *in fact* or not, but in Robinson *v.* Wilkinson, 3 Price, 538, it is said to be "clear law that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner by any acts of his during the concealment of the unknown partner." There, Wilkinson was a secret partner with Cay in a vessel. The plaintiff supplied the vessel with stores on the credit of Cay; took Cay's sole bills for the amount of his debt; allowed him to renew them when due, and afterwards, Cay proving insolvent, compounded with him for the unpaid portion of the debt, and received as security the acceptance of a third person. But the fact

his copartner being unknown to the creditor was no bar to a joint action upon the same note against both the ostensible and the secret partner. (*c*) But this doctrine is opposed to the weight of American authority; and upon the ground that a partnership debt is, in this respect, joint only, and not joint and several, a judgment against the ostensible partner or partners, though unsatisfied, may be pleaded in bar to a subsequent suit upon the same cause of action, where both the ostensible and the secret partners are joined as defendants. (*d*) It has, however, been said, that the law as to dormant partners is confined to commercial partnerships, and does not extend to speculations in land. (*e*)

§ 82. **Liability of a Nominal Partner.** — If such be the law in regard to one who is an actual but a secret partner, on the other hand, if he be not a partner in fact, but has, for or without a reason, suffered those who dealt with the firm, or any one of them, to believe that the firm had the guaranty of his liability as partner, and thus gave to the firm his credit, there are no grounds whatever for permitting him to refuse to satisfy that guaranty, merely because the actual relation between him and the partnership would not of itself have created it. (*f*) To give to such a circum-

of Wilkinson's interest in the ship being unknown to the plaintiff during the time of these several transactions, it was held that he was not discharged by anything that had taken place. A similar decision was made in Chamberlain *v.* Madden, 7 Rich. 395.

(*c*) Sheehy *v.* Mandeville, 6 Cranch, 253 (overruled in Mason *v.* Eldred, 6 Wall. 231). See Van Ness *v.* Forrest, 8 Cranch, 30; Watson *v.* Owens, 1 Rich. 111; Brozel *v.* Poyntz, 3 B. Mon. 178; Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Dennett *v.* Chick, 2 Me. 191; Nichols *v.* Cheairs, 4 Sneed, 229.

(*d*) Robertson *v.* Smith, 18 Johns. 459; Ward *v.* Johnson, 13 Mass. 148; Smith *v.* Black, 9 S. &. R. 142; Moale *v.* Hollins, 11 G. & J. 11; Willings *v.* Consequa, 1 Pet. C. C. 301; Anderson *v.* Levan, 1 W. & S. 334. See further Pierce *v.* Kearney, 5 Hill, 94; Moss *v.* McCullough, 5 Hill, 135, 136; Ward *v.* Motter, 2 Rob. (Va.) 559, 560; Nichols *v.* Anguera, 2 Mills, 290; Grafton *v.* The United States, 3 Story, 649; United States *v.* Cushman, 2 Sumn. 438; Gibbs *v.* Bryant, 1 Pick. 121; Peters *v.* Sandford, 1 Denio, 224; Van Valen *v.* Russell, 13 Barb. 593; Ledam *v.* Hodges, 4 McLean, 51; How *v.* Kane, 2 Chand. 222; Philson *v.* Bampfield, 1 Brev. 202. Whether, if a creditor has lost his right of action against all the partners, by obtaining judgment against the ostensible partner alone, equity will relieve him as against the dormant partners when discovered, see Penny *v.* Morton, 4 Johns. Ch. 566; Willings *v.* Consequa, 1 Peters C. C. 301; Smith *v.* Black, 9 S. & R. 142; Ledam *v.* Hodges, 4 McLean, 51; How *v.* Kane, 2 Chand. 222.

(*e*) Pitts *v.* Waugh, 4 Mass. 424; Smith *v.* Jones, 12 Me. 332; Smith *v.* Burnham 3 Sumn. 470. See *post,* § 269 [*sed* query].

(*f*) Young *v.* Axtell, cited in Waugh *v.* Carver, 2 H. Bl. 235. There the question was, whether Mrs. Axtell was liable as partner with the defendant, for coals sold and delivered by the plaintiff. An agreement was in evidence, from which a partnership *inter se* was attempted to be proved; but, it being shown that bills were made out for goods sold to her customers in their joint names, Lord Mansfield said: "However, as she suffered her name to be used in the business and held herself out as a partner, she was certainly

stance this effect would be to sanction an obvious and easy fraud. It is, however, evident that he is liable as a partner only to those who have been led with his consent to believe him a partner, and who have trusted the firm on his credit. (*ff*)

§ 83. **General Authority of Partner.** — The general principle which lies at the foundation of the partner's liability is, that every partner has full and absolute authority to bind all the partners by his acts or contracts, in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members. No principle is better established than this: it rests not only on universal usage and universal authority, but on obvious reason and necessity; because, if the rule were otherwise, a very large proportion of the advantages and facilities for which partnerships are formed would be lost. It must, however, be remembered that a partner binds the firm, necessarily only when he uses the name of the firm.[1] Hence it has been held that the execution of a mortgage of personal property of a partnership, by one partner in his individual name, passes no title. (*uu*)

§ 84. **How far it may be limited.** — This authority of each partner is only an implied one. It is a fair inference from the fact of partnership: it is an inference from the reason of the thing, as well as from the rules of law. But it is an inference which cannot be made when the partners disclaim it, honestly, in a reasonable way, and by act as well as word. Hence, if the act of a partner be forbidden by his copartners, and notice is given to the person with whom he deals, he no longer acts as their agent, and

liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." The ground upon which persons held out as partners are made liable, as such, to third persons, is thus stated by Lord Chief Justice Eyre in Waugh *v.* Carver, *supra:* "Now, a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money; and, to go still further, not to receive any profits. But, if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact, they lent it only to two of them, to whom, without the others, they would have lent nothing." See further, in illustration of the general principle, De Berkom *v.* Smith, 1 Esp. 29; Guidon *v.* Robson, 2 Camp. 302; Parsons *v.* Crosby, 5 Esp. 199; *Ex parte* Watson, 19 Ves. 461; *Ex parte* Matthews, 3 Ves. & B. 125; Dolman *v.* Orchard, 2 C. & P. 104; Stearns *v.* Haven, 14 Vt. 540; Cottrill *v.* Vanduzen, 22 Vt. 511; Furber *v.* Carter, 11 Humph. 271; Perry *v.* Randolph, 6 S. & M. 335. See also *post*, § 93; Fisher *v.* Bowles, 20 Ill. 396; Irwin *v.* Conklin, 36 Barb. 64; Burns *v.* Rowlands, 40 Barb. 368; Moss *v.* Jerome, 10 Bosw. 220; Moffat *v.* Moffat, 19 Bosw. 468.

(*ff*) Wood *v.* Pennell, 15 Me. 52.

(*uu*) Clark *v.* Houghton, 12 Gray, 38; and see Butterfield *v.* Hensley, 12 Gray, 226; and Cummings *v.* Parish, 30 Miss. 412.

[1] Norton *v.* Thatcher, 8 Neb. 186. See *post*, § 98.

his act is only his own. (*uuu*) The great difficulty is in drawing the line between a rule which would give to any partner, at his own pleasure, all the advantages and none of the liabilities of a partner, and, on the other hand, permitting reasonable and honest limitations or qualifications of liability which ought to operate on all who have contracted with full knowledge of them, and have therefore assented to them. (*v*) It should be added, that the

(*uuu*) Yeager *v.* Wallace, 57 Pa. 365; [Ellis *v.* Allen, 80 Ala. 515, 2 So. 676; Moffitt *v.* Roche, 92 Ind. 96.]

(*v*) Thus, in Alderson *v.* Pope, 1 Camp. 404; note (*a*), Lord Ellenborough held, that when there was a stipulation between A., B., & C., who appeared to the world as copartners, that C. should not participate in the profit and loss, and should not be liable as partner, C. was not liable as partner to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership. Compare with this case Brown *v* Leonard, 2 Chitty, 120. In Batty *v.* M'Cundie, 3 C. & P. 202, the defendants had become shareholders in a newspaper, the prospectus of which Col. Jones, one of the plaintiffs, who were partners, had been concerned in preparing, and which stated that the subscribers were not to be partners, and were not to be liable for more than their subscriptions; the present suit being brought for the price of stationery furnished for the newspaper. Parke, J. (in summing up), said: "The question is, whether Col. Jones, having a knowledge of all the circumstances, can maintain the action; for it is clear that his knowledge is the knowledge of all the plaintiffs. There is no doubt that the defendants were proprietors; but that will not make them partners. The question is, whether Col. Jones did not know that these persons, though called proprietors, were not to be deemed partners, and whether he did not give them an assurance that they would not be liable for more than their subscriptions? The prospectus states that the subscribers are not to be partners; and it is proved that he knew of that prospectus, and acted as treasurer under it. How can he, after this, say that the defendants are liable? The question for our consideration is, whether Col. Jones does not accede to the proposition, that the defendants are not liable, and undertake that he will not look to them as responsible? If you believe the evidence in the sense that I have taken of it, I tell you, that, in point of law, the plaintiffs are not entitled to recover." *In re* Worcester Corn Exchange Co., 3 De G., M. & G. 180; Bailey *v.* Clark, 6 Pick. 372. See also Boardman *v.* Gore, 15 Mass. 339; Baxter *v.* Clark, 4 Ired. 127; Denny *v.* Cabot, 6 Met. 93; Jordan *v.* Wilkins, 3 Wash. C. C. 115; Dow *v.* Sayward, 12 N. H. 271; Cargill *v.* Corby, 15 Mo. 425; Langan *v.* Hewett, 13 S. & M. 122; Brent *v.* Davis, 9 Md. 217. In Leavitt *v.* Peck, 3 Conn. 124, Hosmer, C. J., says: "It is a well-established principle, that the contract of a partner is obligatory for his copartner, by virtue of an implied authority, which may be rebutted by a refusal to be bound by his acts. By legal consequence, the partners whose authority is thus declined cannot bind the copartnership in favor of those who have knowledge of the fact . . . The principle under consideration is not founded at all on any supposed waiver of the creditor, but solely and exclusively on the declaration of the person declining to be bound. The implied authority of his partner he has annihilated; and the contract in the name of the firm is of no validity beyond the personal obligation it imposes on the individual making it." So if, upon the dissolution of a copartnership, the outgoing partner assigns to the continuing partner all his interest in the outstanding partnership debts and accounts, the subsequent release of a debt by the outgoing partner to a debtor having notice of the agreement is void. Gram *v.* Cadwill, 5 Cowen, 489. See *Ex parte* Harris, 1 Madd. 583.

Partners sometimes give notice to particular persons, or to the public generally, that they are not responsible for

question whether, in any particular case, an alleged partner has disproved the evidence or rebutted the legal presumption of

the acts of one or more of the other partners. Such repudiation of the ordinary liabilities of a partner, especially if it be with reference to a single transaction, is not, perhaps, necessarily inconsistent with the continuance of the partnership. But it more commonly happens when one or more of the partners wishes to dissolve the partnership and retire, while the rest choose to continue in the business. Such warnings by partners of limitations they mean to put to their own liability, and to the authority of the other partners, have the same effect, so far as third persons are concerned, as the communication of stipulations between partners restricting their liability, and upon similar principles. For, a partnership being once proved to exist, and the implied power of each partner to act for the others in everything within the scope of the partnership business being once given, the fair presumption upon which third parties are justified in acting is, that the partnership and the consequent implied authority of each partner still continue. But this presumption is of course wholly rebutted by notice to the contrary, and can then no longer be a reason for holding the party giving the notice to liability as a partner. In Galway *v.* Matthew & Smithson, 10 East, 264, the defendants, partners in trade, were sued upon a promissory note. Matthew let judgment go by default; but Smithson defended the action on the ground that the plaintiff, before he took the note in question, had notice of an advertisement, then recently published in a newspaper by Smithson, wherein he warned all persons not to give credit to the defendant Matthew on his (Smithson's) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. The defendants having a verdict on this ground (Galway *v.* Matthew, 1 Camp. 403), upon motion to set aside the nonsuit, Lord Ellenborough, C. J., said: "The general authority of one partner to draw bills or promissory notes to charge another, is only an implied authority; and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Matthew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others: they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice, previously given to him by one of them, that he will not be liable for any bill or note signed by the others." Layfield's Case, 1 Salk. 292; Minnit *v.* Whinnery, 2 Bro. P. C. 323, 16 Vin. Abr. 244; *Ex parte* Harris, 1 Madd. 583; Vice *v.* Fleming, 1 Y. & J. 227; Rooth *v.* Quinn, 7 Price, 193; Feigley *v.* Sponeberger, 5 Watts & S. 564; Johnston *v.* Dutton, 27 Ala. 245. It has, however, been questioned whether, if a firm consist of more than two members, the expressed and known dissent of one partner to a contract about to be entered into in good faith by a majority of the partners in the name of the firm will operate to free the dissenting partner from liability thereon. Story on Part. § 123, and notes; 3 Kent Com. 45. This question will be considered when we come to treat of the power of a majority of the partners to bind the partnership, *post*, § 147. In one case, indeed, it was said: "By the act of entering into a copartnership, each of its members becomes clothed with full power to make any and every contract within the scope and limits of the copartnership business. All such contracts will therefore be absolutely binding upon the several members. This power is incident to the copartnership relation, and must exist, in defiance of expostulations and objections, while the relation endures." Wilkins *v.* Pearce, 5 Denio, 541, 544. But, though the judgment in this case was affirmed in the Court of Appeals, the *dictum* just quoted does not appear to have been approved. On the other hand, the acts of the protesting partner subsequent to his

authority on the part of his partner, to bind, seems to be a question of fact. (*w*)

On the whole, it may be said that the law-merchant, as it is incorporated into the common law of England and of this country, does not permit one to secure to himself all the advantages and gains of partnership, and guard himself against all its liabilities and losses; and that his attempt to do so would be defeated by casting upon him those liabilities. But stipulations are often entered into which must be understood as giving up, on the part of all the partners, or of a part, some of the powers and advantages of partnership, and providing against a proportionate measure of liability; and any stipulations of this character would undoubtedly take effect as far as they were known.

Thus, it is quite common, in continental Europe, for mercantile firms, in their circulars or other advertisements, to designate one or more of the partners as alone having authority to put the

expression of dissent were held to amount to a waiver of it, and to a ratification of the transactions to which he had originally objected. s. c. 2 N. Y. 469, 472. See opinion of Colden, Senator, in Smith *v.* Lasher, 5 Cow. 689, 710. In Willis *v.* Dyson, 1 Stark. 164, Lord Ellenborough held, "that after notice by one partner not to supply any more goods on the partnership account, it would be necessary for the party sending goods after such notice to prove some act of adoption by the partner who gave the notice, *or that he had derived some benefit from the goods.*" This qualification of the rule, that a partner may limit his liability by giving notice to that effect, though reiterated upon the authority of this case by some of the writers on partnership (see 3 Kent Com. 8th ed. 49; Gow on Part. 52), seems open to considerable question, as matter of principle. Nor does it appear to have the support of any other judicial decision. On the contrary, in Galway *v.* Smithson, *supra*, Matthew, for whose acts Smithson, his partner, had given the plaintiff notice he would not be responsible, had, after the notice, borrowed money of the plaintiff, and had applied it mostly to the payment of partnership debts. Nevertheless, Smithson was held not liable on a note given in the partnership name for the sum so borrowed. So in Leavitt *v.* Peck, 3 Conn. 124. In Monroe *v.* Conner, 15 Me. 178, Shepley, J., after an examination of the point, comes to the conclusion that "it is more in accordance with the general principles of law, and with good faith and fair dealing, to hold that a partner is not bound by a contract after he has given notice, to the party proposing to make it, that he would not be bound by it." When notice is given to a party proposing to make a certain contract, that one member of a firm will not be bound by the action of the other members, if the party thus notified still persists in his purpose, and completes the contract, he must be presumed to have made it solely on the credit of the non-dissenting partners. But we shall see later (§ 88), that where credit is given to one or more of the individual partners, the other partners are not liable on such contracts, even though they inure to the benefit of the partnership.

(*w*) Leavitt *v.* Peck, 3 Conn. 124; Willis *v.* Dyson, 1 Stark. 164; Vice *v.* Fleming, 1 Y. & J. 227. See authorities cited above. And if a partner, in the presence of a party dealing with another partner who acts in the name of the firm, refuses to be bound by the transaction, yet his subsequent acts and declarations may amount to a waiver of his dissent, and to a ratification of the transaction from which he thus at first dissented. Pearce *v.* Wilkins, 2 N. Y. 469.

name of the firm to negotiable paper. If a firm should so advertise in this country, it would undoubtedly prevent any person who knew of it from holding the firm on the signature of any other member. But it should not affect one who did not know it; because he might fairly imply the authority of each partner from the partnership. Formerly, the phrases special and limited partnerships, which now have a statute meaning, were applied quite loosely to those which were less general than usual; (*x*) and it was always held that, where these limitations were known to a customer, he was affected by them;[1] and further, that this specialty or limitation may be inferred from facts. Limitations upon the authority of one partner to represent his copartners may also be imposed by the nature and usages of particular trades.

§ 85. **Limitation by Trade Usage. Non-trading Partnership.** — The fact that a partnership is engaged in a particular trade being known, is sufficient notice to third persons of the limitations which the nature and customs of that trade place upon the power of each partner;[2] and third parties dealing with a partner in matters outside the scope of its usual business, to charge his firm therein, must show him to have possessed special authority so to act. Thus, it has been held, that persons who are engaged in working a mine or a farm, in partnership, give no implied authority to one another to borrow money or to draw bills of exchange on joint account and credit, even in promotion of the joint business. Hence, if money be borrowed, or a bill be drawn, by one of several persons jointly interested in a farm or a mine, the

(*x*) See Lansing *v.* Ten Eyck, 2 Johns. 304; Mumford *v.* Nicoll, 20 Johns. 624, 629; Bentley *v.* White, 3 B. Mon. 263; Reynolds *v.* Cleaveland, 4 Cow. 282; Ensign *v.* Wands, 1 Johns. Cas. 171. In these last two cases the word "limited" is used only in the head-note. Ensign *v.* Wands, 1 Johns. Cas. 171; De Berkom *v.* Smith, 1 Esp. 29; Post *v.* Kimberly, 9 Johns. 489. When, by the terms of a partnership, the liability of each partner is limited, and this limitation is known to a third person who contracts with a partner in a matter for which he alone is responsible, the other partners are not liable. Thus, A. and B. are partners, A. agreeing to furnish capital, and B. labor; and C. knowing these facts contracts with B. to perform in part the labor which B. was to furnish. C. must look to B. for his compensation. Pollock *v.* Williams, 42 Miss. 88; Newman *v.* Baker, 9 Johns. 207; Medberry *v.* Soper, 17 Kas. 369.

[1] The rights of third persons against a partnership will be limited by the special provisions of the articles of copartnership known to such third persons. Smith *v.* Vanderburg, 46 Ill. 34; Knox *v.* Buffington, 50 Ia. 320. So where a guardian was member of a firm, but not authorized to contract firm debts, and he put into the business money of his ward, making a firm note to himself as guardian, it was held that no recovery could be had. Wintermute *v.* Torrent, 83 Mich. 555, 47 N. W. 358.

[2] Randall *v.* Meridith, 76 Tex. 669, 13 S. W. 576.

lender or holder cannot hold the other partners upon it, without showing that they had in some way authorized the acting partner so to bind them. (*y*) [1]

(*y*) Dickinson *v.* Valpy, 10 B. & C. 128; Kimbro *v.* Bullitt, 22 How. 256; Ulery *v.* Ginrick, 57 Ill. 531; Greenslade *v.* Dower, 7 Ill. 635; Ricketts *v.* Bennett, 4 C. B. 686. See Shicknesse *v.* Bromilow, 2 Cr. & J. 425; Hawtayne *v.* Bourne, 7 M. & W. 595; Tredwen *v.* Bourne, 6 M. & W. 461; Howken *v.* Bourned, 8 M. & W. 703; Burmester *v.* Norris, 6 Exch. 796. But where it was shown that it was the custom of planters generally to borrow money when necessary for the purposes of their business, it was held, that one of a firm engaged in the business of planting might bind his copartners by borrowing money for their business, and giving a note therefor. Lea *v.* Guice, 13 S. & M. 656. And in McGregor *v.* Cleaveland, 5 Wend. 475, a promissory note given for the firm by one of two partners in the business of *farming and coopering* was held good, and binding upon both. "An attorney, *qua* attorney, is not a scrivener: it is part of his business to prepare conveyances and negotiate mortgages, and see that the deeds are executed and the transaction completed. A scrivener is a person who receives money to lay out upon security, and to hold the money in his hands until an opportunity offers for laying it out." Hence, where two are in partnership merely as attorneys, one member of the firm is not rendered liable as partner by his copartner's receiving money indefinitely for the purpose of being laid out on mortgage security. Harman *v.* Johnson, 2 E. & B. 61, 188. See Sims *v.* Brutton, 1 E. & B. 446; Wilkinson *v.* Candlish, 19 L. J. Rep. Exch. 166. So, if persons are in partnership as attorneys, there is no implied authority in one of them to bind the rest by pledging the name of the firm for a loan of money, Breckenridge *v.* Shrieve, 4 Dana, 375; Hedley *v.* Bainbridge, 3 Q. B. 316; or by putting the name of the firm in any shape to negotiable paper, Levy *v.* Pyne, 1 C. & M. 453. See Smith *v.* Coleman, 7 Jur. 1053; Wells *v.* Turner, 16 Ind. 133; Garland *v.* Jacomb, L. R. 8 Ex. 218. In Wisconsin, after a careful review of the authorities, it was held that one member of a non-trading partnership — law firm, for instance — cannot bind his copartner by a bill or note, drawn, accepted, or indorsed by him, even for a debt of the firm, unless specially authorized by his copartner, or it be necessary to carry on the partnership, or it be shown to be usual in similar partnerships; and the burden of proof of authority, necessity, and usage is upon the party claiming under the note. Smith *v.* Sloan, 37 Wis. 285; Hunt *v.* Chapin, 6 Lans. 139; McCord *v.* Field, 27 U. C. C. P. 391; Prince *v.* Crawford, 50 Miss. 344. In like manner, a partner in the practice of physic is not bound by a note drawn by his copartner in the name of the firm, for the purpose of raising money, Crosthwait *v.* Ross, 1 Humph. 23; nor by any other of his copartner's contracts which are not connected with their business as physicians, Thompson *v.* Howard, 2 Ind. 245. So if four are interested as partners in two shares of the stock of a company formed for digging tunnels, the peculiar and limited character of the partnership business precludes any legal implication that one of the partners can bind the others by issuing commercial paper in the partnership name. Gray *v.* Ward, 18 Ill. 32. See Cocke *v.* Branch Bank, 3 Ala. 175, respecting the limitations to the authority of one of a firm of tavern-keepers. *In re* Worcester Corn Exchange Company, 3 De G., M. & G. 180; and Cheeny *v.* Clark, 3 Vt. 431, as to the liability of members of a building association. See also Williams *v.* Thomas, 6 Esp. 18; Bentley *v.* White, 3 B. Mon. 263; Vance *v.* Campbell, 8 Humph. 524; Lanier *v.* McCabe, 2 Fla. 32; Miller *v.* Hines, 15 Ga. 197; Benson *v.* M'Bee, 2 McMullan, 91; Goodman *v.* White, 25 Miss. 163; Cargill *v.* Corby, 15 Miss. 425; Lansing *v.* Gaine, 2 Johns. 300. In Andrews *v.* Lehott, 10 Barr, 47, Andrews & Harris had agreed to form a

[1] Whether an act is outside the scope of a certain business in which a partnership is engaged, is a question of fact, depending upon the known customs and usages of that

§ 86. **Limitation by Nature of Transaction.** — A limitation or exception may grow out of the nature of the particular transac-

statutory limited partnership, Harris being the special partner. With that view, they had placed upon record, and otherwise published to the world, in accordance with the provisions of the statute, the terms of their connection. A subsequent breach of the statute made Harris a general partner, in an action against both the partners upon contracts made in the name of the copartnership. Harris alleged in defence that the plaintiff, at the time the contracts were made, knew he was a special partner, and gave credit to the firm and the general partners, and did not rely on him. But it was held, that this knowledge by the creditor of the special partnership could not discharge the special partner from the general liability fixed on him by statute. The court said: "If the plaintiffs knew they held themselves out as a limited partnership, they also knew that, if the defendants failed to comply with the requisition of the act, they became general partners, and were liable as such. The presumption is, that the contract was made in reference to the legal rights of the parties; and this presumption can alone be rebutted by clear proof of an express contract, waiving all the plaintiff's rights under the statute."

business. If these customs and usages authorize a partner to do such an act on behalf of the firm, he may bind the firm by the act. Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497; Pease *v.* Cole, 53 Conn. 53; Judge *v.* Braswell, 13 Bush, 67; Nat. State Capital Bank *v.* Noyes, 62 N. H. 35; Biggs *v.* Hubert, 14 S. C. 620.

If the act is necessary for carrying on the business, it is, of course, within the scope of the business. Nat. Exchange Bank *v.* White, 30 F. R. 412; Deardorf *v.* Thacher, 78 Mo. 128; Levi *v.* Latham, 15 Neb. 509, 19 N. W. 460. If the act is not within the apparent scope of the business, the firm is not bound except upon evidence of express or implied authority of all the partners, or ratification by them. Such authority or ratification, however, makes the firm liable. Pease *v.* Cole, 53 Conn. 53; Judge *v.* Braswell, 13 Bush, 67; Holmes *v.* Kortlander, 64 Mich. 591, 31 N. W. 532; Conely *v.* Wood, 73 Mich. 203, 41 N. W. 259; Deardorf *v.* Thacher, 78 Mo. 128; Nat. State Capital Bank *v.* Noyes, 62 N. H. 35; Clarke *v.* Wallace, 1 N. D. 404, 48 N. W. 339.

The burden is on the plaintiff to prove authority or ratification. Judge *v.* Braswell, 13 Bush, 67; Van Dyke *v.* Seelye (Minn.) 52 N. W. 215.

The payment of a stranger's debt is not within the scope of a partnership business; consequently a firm note given by a partner for the accommodation of a stranger is not valid in the hands of one with notice. Heffron *v.* Hanaford, 40 Mich. 305; Van Dyke *v.* Seelye (Minn.), 52 N. W. 215.

So a promise by one partner in the name of the firm to pay the debt of a third party is not valid against the firm. Shaaber *v.* Bushong, 105 Pa. 514.

So one partner cannot bind the firm by guaranteeing the note or other debt of a third party. Osborne *v.* Stone, 30 Minn. 25, 13 N. W. 922; Osborne *v.* Thompson, 35 Minn. 229, 28 N. W. 260; Clarke *v.* Wallace, 1 N. D. 404, 48 N. W. 339; Fore *v.* Hittson, 70 Tex. 517, 8 S. W. 292. This is true even in case of guaranty of the rent of an employee of the firm, Avery *v.* Rowell, 59 Wis. 82, 17 N. W. 875; or of a promise to pay the medical expenses of an employee, Woodruff *v.* Scaife, 83 Ala. 152, 3 So. 311. Where, however, a partnership bought out a manufacturing business, and one partner agreed with the workmen that if they would continue at work the firm would pay their arrears of wages, this was held to be within the scope of the firm's business, and to bind the firm. Wills *v.* Cutler, 61 N. H. 405.

As to acts within the scope of a partnership, a fundamental distinction exists between commercial or trading partnerships and non-trading partnerships; arising out of the fact that in a non-trading partnership there is no general power in the partners to do such acts as are customary in carrying on business.

Thus a partner in a non-trading partnership does not generally have power to bind

tion. Thus, if a partner of a firm which deals only in merchandise gives the note of the firm for a horse, it would be a fair presumption that the party receiving it — if he knew the general business

the firm by signing the firm name to commercial paper given for borrowed money. This rule has been held to apply in the following sorts of business: —

Farming, Greenslade *v.* Dower, 7 B. & C. 635; Kimbro *v.* Bullitt, 22 How. 256.

Practising law, Hedley *v.* Bainbridge, 3 Q. B. 316; Levy *v.* Pyne, Car. & M. 453; Friend *v.* Duryee, 17 Fla. 111; Breckinridge *v.* Shrieve, 4 Dana, 375; Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510.

Carrying on saw-mill, Dowling *v.* Exchange Bank, 145 U. S. 512 (but see Kimbro *v.* Bullitt, 22 How. 256).

Keeping tavern, Cocke *v.* Bank, 3 Ala. 175.

Managing a theatre, Pease *v.* Cole, 53 Conn. 53, 22 Atl. 681.

Carrying on mill, Lanier *v.* McCabe, 2 Fla. 32.

Digging tunnels, Gray *v.* Ward, 18 Ill. 32.

Printing, Bays *v.* Conner, 105 Ind. 415, 5 N. E. 18.

Working threshing-machine, Horn *v.* Newton City Bank, 32 Kas. 518, 4 Pac. 1022.

Real estate, Lee *v.* First Nat. Bank, 45 Kas. 8, 25 Pac. 196; Deardorf *v.* Thacher, 78 Mo. 128.

Mining, Judge *v.* Braswell, 13 Bush, 67; Randall *v.* Merideth, 76 Tex. 669, 13 S. W. 576. (*Aliter* of a commercial parnership for carrying on a mine. Decker *v.* Howell, 42 Cal. 636.)

Planting, Benton *v.* Roberts, 4 La. Ann. 216; Prince *v.* Crawford, 50 Miss. 344; Morgan *v.* Pierce, 59 Miss. 210.

Keeping livery stable, Levi *v.* Latham, 15 Neb. 509, 19 N. W. 460.

Sugar refining, Livingston *v.* Roosevelt, 4 Johns. 251.

Practising medicine, Crosthwait *v.* Ross, 1 Humph. 23.

Publishing, Pooley *v.* Whitmore, 10 Heisk. 629.

On the other hand, the firm has been held liable on firm paper made by one partner, where the business was collecting, Van Brunt *v.* Mather, 48 Ia. 503; and soap-making, Deitz *v.* Regnier, 27 Kas. 94.

So a partner in a non-trading firm cannot ordinarily borrow money so as to make the firm liable. Harris *v.* Baltimore, 73 Md. 22, 20 Atl. 111 (street improvement); Williams *v.* Gillies, 75 N. Y. 197 (purchase of land on speculation).

Where the object of a non-trading partnership is not to sell, one partner cannot sell firm property so as to pass all the interest of the firm. Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351 (keeping mare for breeding purposes); Blaker *v.* Sands, 29 Kas. 551 (improving breed of sheep).

Where a partnership is formed for a certain purpose, one partner has no power to bind the firm by engaging in business of another sort. So a partner in a commercial firm cannot bind the firm by taking a promissory note for collection. Pickels *v.* McPherson, 59 Miss. 216.

On the other hand, when a firm has become the owner of a chattel mortgage and has foreclosed, one partner may bind the firm by creating an agency to sell the mortgaged goods. Banner Tobacco Co. *v.* Jenison, 48 Mich. 459, 12 N. W. 655. And where a firm was formed to build a building according to certain plans, one partner in contracting for extra work is acting within the apparent scope of the firm business, and binds the firm. Hoffman *v.* Toll (Ind.), 28 N. E. 557.

Where there are written articles, the question whether a certain line of business is contemplated by the articles, and therefore within the scope of the partnership, is for the court. Banner Tobacco Co. *v.* Jenison, 48 Mich. 459, 12 N. W. 655.

Where a partner does an unauthorized act in such a way that the firm is not bound it is valid as against the acting partner, and (if a sale) passes his interest in the property. Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351; Blaker *v.* Sands, 29 Kas. 551; Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510.

of the firm — should have supposed that the partner had no authority to give such a note. (z) The rule itself, which gives to a partner his authority, limits it, in perhaps all the authorities which assert the rule, to contracts or acts within or belonging to the business of the firm. The reason of this is perfectly obvious; and it would follow that as partners may certainly limit their business as they please, by so doing they place an analogous limitation to the authority of the partners, in reference to any one knowing the limitation of their business.

§ 87. **General Rule a Safeguard against Fraud.** — One reason why all the partners are bound by the acts of one, is, that great and inevitable frauds would spring from the want of this rule. Thus, it would always be easy for a firm doing the largest business to have one partner (entitled to a very small share) without means, and therefore without risk, who should sign all their paper and execute all their contracts; the other partners taking all the profits and casting all the losses on him. But it would as certainly be a fraud, if a customer, who knew that a partner with whom he dealt had no authority to act for his partners in a certain way or on certain terms, should nevertheless make that very bargain with him, relying on the responsibility of the other

(z) Holmes *v.* Burton, 9 Vt. 252; Livingston *v.* Roosevelt, 4 Johns. 251. In this last case A. & B. formed a copartnership under the style of A. & Co., in the business of sugar-refining, and so advertised the public. B. afterwards, without the knowledge of A., bought a quantity of brandy, for which he gave his note, payable to the firm, and indorsed by him with the name of the firm. The plaintiff, the indorsee of said note, took both the newspapers in which the character of the business of A. & Co. was advertised. The question in the case being whether the copartnership was liable on the above note, Kent, C. J., said; "All partnerships are more or less limited. There is no one that embraces, at the same time, every branch of business; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be some circumstances in the case to destroy that presumption. 'If,' said Lord Eldon (8 Vesey, p. 544), 'under the circumstances, the person taking the paper can be considered as being advertised that it was not intended to be a partnership proceeding, the partnership is not bound.' Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting-house, the sign, &c., are the usual and regular *indicia* by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. There must be some authority, beyond the mere circumstance of partnership, to make such a contract binding."

[A partnership for raising and selling agricultural seeds is not bound by the purchase by one partner of a number of roses and other flowers, since such a purchase is not within the apparent scope of the business. Sargent *v.* Henderson, 79 Ga. 268, 5 S. E. 122.]

partners. (*a*) A firm may undoubtedly permit one of the partners to act in his own name, but for the interest and benefit of the firm, and then any loss in such transaction is a loss of the firm. As where one partner deposited the funds of the firm in a bank in his own name, with the consent and for the convenience of the firm, and the funds were charged to him in the books of the firm, but only to indicate in whose hands they were, and the bank became insolvent, — it was held to be the loss of the firm, and not of the partner. (*aa*)

We have already seen that any stipulations between partners bind them, and there is nothing to prevent them from agreeing that one shall share all the profits, but that the others shall bear all the losses. This, however, will not prevent a creditor of the firm from suing all, nor from levying an execution on the property of the partner thus exempted, unless the creditor had knowledge of the agreement, and made his bargain with the firm so far in acceptance of and accordance with that agreement, that he must be taken not to have given any credit to the exempted partner. If that partner is made to pay any share of loss, by the general law of partnership, he can turn round upon his partners, under their agreement, and recover it from them.

It is well established that if a partner, in direct violation of his stipulations as partner, or in fraud of the partnership, enters into any contract on their part with a third person, the partners are not discharged by his breach of contract, or by his fraud, unless the third person was participant or conusant of it. (*b*) [1]

(*a*) To a similar effect is the language of Kent, C. J., in Livingston *v.* Roosevelt, 4 Johns. 278, 279. He says that where the particular business of a firm is made known in a usual and reasonable way to the public, "the creditor is *advertised* that he is not dealing on a partnership account; and for him to take a partnership engagement, without the consent of the firm, is, in judgment of law, a fraud upon the firm. Suppose, in the case of a general commercial partnership, a debt was to be contracted by one partner upon the purchase of new lands; or suppose, in the case of a partnership between two attorneys, in law business, a partnership note was to be given by one of them upon the purchase of groceries or furniture for his family, — it could not be supposed by any one that the company would be holden. These would be plain cases of a fraud, practised upon the firm, of which the creditor would be chargeable with notice. When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is to be presumed to know the extent of the partnership with whose member he deals." Dow *v.* Sayward, 12 N. H. 275. See Bignold *v.* Waterhouse, 1 Moore & S. 259; Maltby *v.* N. W. & R. Co., 16 Md. 422.

(*aa*) Campbell *v.* Stewart, 34 Ill. 151.

(*b*) See *post*, ch. 7, "Of the Rights and Duties of Partners between Themselves." And see Salland *v.* McRae, 16

[1] Where a partner, acting within the scope of his authority, borrows money in the name of the firm, a misuse of the money by the partner does not excuse the firm

We add, that the person so dealing with a fraudulent partner, in actual ignorance of the fraud, but in an ignorance which implies gross negligence on his part, should not be permitted to hold the firm. This would be an inference from the principles of agency. This rule has been applied to the holder of negotiable paper, and should be applied to every one dealing with such partner. (*c*)

La. Ann. 193; Stockwell *v.* Dillingham, 50 Me. 442; Mechanics' Bank *v.* Foster, 44 Barb. 87; Gale *v.* Miller, 44 Barb. 420; Tilford *v.* Ramsey, 37 Mo. 563; Hayward *v.* French, 12 Gray, 453; Sterling *v.* Jandon, 48 Barb. 459; Blodgett *v.* Weed, 119 Mass. 215; [Andrews *v.* Conger, 26 U. S. Supr. Ct. (L. Co. op. Ed.) 90; Nat. Exchange Bank *v.* White, 30 F. R. 412; Humes *v.* O'Bryan, 74 Ala. 64; Manville *v.* Parks, 7 Col. 128; Lynch *v.* Thompson, 61 Miss. 354; Benninger *v.* Hess, 41 Oh. St. 64.] See also Guild *v.* Welch, 119 Mass. 257. A partner cannot, for a private consideration, discharge a debtor of the firm, by an agreement to pay the debtor's note to the firm. Lewis *v.* Westner, 29 Mich. 14. If a partner pays his private debts by receipting a bill due from his creditor to the firm, the firm, or its assignee, may nevertheless recover the amount of their bill. Thomas *v.* Pennrich, 28 Ohio St. 55. If the appropriation by one partner of partnership property to pay his private debt, be made and received in good faith and under such circumstances that the other partners and the creditors are not defrauded, the money so appropriated cannot be recovered back. Corwin *v.* Suydam, 24 Ohio St. 210.

(*c*) Lloyd *v.* Freshfield, 2 C. & P. 325; New York Fire Insurance Co. *v.* Bennett, 5 Conn. 574. In this last case, Hosmer, C. J., says: "It is now insisted, that the payee of a promissory note, although he has knowledge that the maker or indorser in the name of the firm is making payment by this act of his own debt, or is becoming the surety of another person, without the concurrence of his partners, and that neither the partnership covenant nor the interest of the partnership sanctions the act, yet that he has a right to subject the partnership. The principle, in direct hostility with justice and convenience, is endeavored to be sustained by the unwarranted supposition, that the payee, not having knowledge that special authority was not given the partner, may fold his arms, and reap a benefit from his supineness. Common sense and common integrity require that he should make inquiry, in such cases, and actually know that authority was given. He is bound, on legal and fair principles, to sustain the affirmative. He knows that the partnership is for mercantile operations. He knows that the partner, signing or indorsing a note in the name of the firm, from the partnership contract, had no implied authority. He knows that the act can alone be authorized by the delegation of express power. And he knows that on the most common and best-established principles, in promotion of justice and prevention of fraud, the person claiming the obligation of contract against a partnership is bound to prove it." See Warren *v.* French, 6 Allen, 317; Kimball *v.* Walker, 30 Ill. 482; Duncan *v.* Lewis, 1 Duvall, 183; Sims *v.* Smith, 12 Rich. L. 685. Whether the plaintiff suing on such a note had such notice as ought to put him on inquiry, is a question for the jury. Waite *v.* Thayer,

from liability. National Bank of Commerce *v.* Meader, 40 Minn. 325, 41 N. W. 1043; Kleinhaus *v.* Generous, 25 Oh. St. 667; Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 818.

The declaration of the partner at the time of making a contract that it is for the firm is enough to charge the firm, if the contract is within the apparent scope of the business. Clark *v.* Taylor, 68 Ala. 453; Dodds *v.* Rogers, 68 Ind. 110; Smith *v.* Collins, 115 Mass. 388; Benninger *v.* Hess, 41 Oh. St. 64; Gavin *v.* Walker, 14 Lea, 643.

§ 88. **Credit Given to one Partner Only.** — He who gives credit to one partner alone, cannot call on the rest. This is true, however the credit be given. As, if the creditor sold him goods; (*d*) or sold to another goods on his guaranty; or received him as surety in any way, or loaned him money. (*e*) If there is no evidence to show to whom credit was given, the fact that money

118 Mass. 473. The burden of proof that a note given in the firm name by one of the partners is not on partnership account, is on the partnership. Currier *v.* Cameron, 31 Mich. 373.

(*d*) As where goods for the use of a stage-coach are supplied to one of several partners in a stage-coach line by one knowing that the agreement between them is that each shall run and stock a particular portion of the road at his own expense. Hiard *v.* Bigg, Mann. N. P. Index, Partners, A. (*a*), 5; Barton *v.* Hanson, 2 Camp. 97; 2 Taunt. 49. So where L. & C., by articles, entered into partnership for the manufacture of hemp; L. to find the stock, and C. to furnish the machinery and operatives. The plaintiff's slave was employed, by C. alone, in the business of the firm, and the present action was assumpsit against the partners for the value of his services. The plaintiff, as the only evidence of the liability of the firm, exhibited the articles of copartnership, providing for the arrangement above stated. It was held that, in the absence of evidence to the contrary, the plaintiff must be presumed cognizant of the duty of C. to furnish hands, and to have contracted solely upon the credit of C.; to whom alone, therefore, he could look for payment. Lafon *v.* Chinn, 6 B. Mon. 305. See Pinckney *v.* Keyler, 4 E. D. Smith, 469. In Young *v.* Hunter, 4 Taunt. 583, Gibbs, J., said: "I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor: as if the parties agree amongst themselves that one house shall purchase the goods and let the other into an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, although such other person would have the benefit of the goods." See further Saville *v.* Robertson, 4 T. R. 725; Gibson *v.* Lupton, 9 Bing. 297; *Ex parte* Harris, 1 Madd. 583; Holcroft *v.* Hoggins, 2 C. B. 488; Sylvester *v.* Smith, 9 Mass. 121; Holmes *v.* Burton, 9 Vt. 252; Ketchum *v.* Durkee, 1 Hoff. Ch. 528; Watt *v.* Kirby, 15 Ill. 200; Meyer *v.* Larkin, 3 Cal. 403. In Johnston *v.* Warden, 3 Watts, 101, the court instructed the jury: "That if A. contract with B. to deliver articles at a specified period, and if in the intermediate time B. and C. enter into a partnership, as upon such a contract, it is to be presumed that payment is to accompany delivery; if credit is given at the time of delivery, it must be presumed to be done upon the credit of the partners, and this whether the existence of the partnership was known to the plaintiff who gave the credit or not. If the existence of the partnership was known at the time no doubt could be raised; but if a credit be given where there is a secret partner, as the credit is supposed to be given as well to him as to those associated with him, upon the ground that he is entitled to the profits, so he in equity should be responsible for the loss in the present case."

(*e*) *Ex parte* Hunter, 1 Atk. 223; Parkin *v.* Carruthers, 3 Esp. 248, per Le Blanc, J.; Lloyd *v.* Freshfield, 2 C. & P. 325; Bevan *v.* Lewis, 1 Sim. 376; Murray *v.* Somerville, 2 Camp. 99; Le Roy *v.* Johnson, 2 Peters, 186; Mifflin *v.* Smith, 17 S. & R. 169; Willis *v.* Hill, 2 Dev. & Bat. 231; Foley *v.* Robards, 3 Ired. 177; Bird *v.* Lanius, 4 Wis. 615; Clay *v.* Cottrell, 18 Pa. 408; Wiggins *v.* Hammond, 1 Mo. 121; Siegel *v.* Chidsey, 28 Mo. 279; Miller *v.* Morrice, 6 Hill, 114; Holmes *v.* Burton, 9 Vt. 252; Evans *v.* Biddleman, 3 Cal. 435; Logan *v.* Bond, 13 Ga. 192; Foster *v.* Hall, 4 Humph. 346; Jaques *v.* Marquand, 6 Cow. 497; Whitaker *v.* Brown, 16 Wend. 505.

borrowed by a partner comes to the use of a firm raises a presumption that the loan was made by him as partner, and, if not rebutted, will make the firm liable for the repayment. (*f*) If the creditor sold goods or loaned money to every one of the partners severally, on their several credit, he could not recover of them jointly, nor hold them mutually responsible, although the money or the goods were immediately used by the borrowers or buyers to make up the stock of the firm, or provide for its debts or business. (*g*) [1]

(*f*) Jaques *v.* Marquand, 6 Cow. 497; Rothwell *v.* Humphreys, 1 Esp. 406; Church *v.* Sparrow, 5 Wend. 223; Whitaker *v.* Brown, 16 Wend. 505. If for money borrowed a partner gives his own bill, or note, or other simple contract security, and suit is brought *directly upon* such individual security, "it cannot be allowed to supply by intendment the names of others, in order to charge them" (per Lord Ellenborough, C. J., in Emly *v.* Lye, 15 East, 7); Skiffkin *v.* Walker, 2 Camp. 308; *Ex parte* Brown, 1 Atk. 225, cited; *Ex parte* Bolitho, Buck, 103; though upon the common money counts the partnership may be charged, if the obligation of the borrowing partner was meant to be taken, not in lieu of, but simply in connection with the partnership liability. Ibid.; Denton *v.* Rodie, 3 Camp. 493; Tucker *v.* Peaslee, 36 N. H. 167. If, however, the obligation of one partner be thus taken, not as a collateral, but as the sole security for the money loaned, the credit must be deemed to have been given solely to that partner, and the lender cannot recover for money had and received by the partnership, notwithstanding the loan went to its use. As where the transaction between a banker and one partner is in fact a discount by the former of the latter's paper; notwithstanding the application of the funds so raised to the uses of the firm, and the understanding by the banker that they would be so applied, the discounter does not become a creditor of the partnership, but simply of the contracting partner; for "the purchase or discount of a note is a contract wholly unconnected with the objects, uses, or application of the money paid." Per Baldwin, J., in Winship *v.* Bank of the United States, 5 Peters, 567; Emly *v.* Lye, 15 East, 7; Denton *v.* Rodie, 3 Camp. 493; Graeff *v.* Hitchman, 5 Watts, 454; Bond *v.* Aitkin, 6 Watts & S. 165; Foster *v.* Hall, 4 Humph. 346; Union Bank *v.* Eaton, 5 Humph. 499; Green *v.* Tanner, 8 Met. 411; Ostrom *v.* Jacobs, 9 Met. 454; Thom *v.* Smith, 21 Wend. 365; Beebe *v.* Rogers, 3 Greene, (Ia.) 319; Mead *v.* Tomlinson, 1 Day, 148. See also Donnally *v.* Ryan, 41 Pa. 306; Folk *v.* Wilson, 21 Md. 538.

(*g*) Saville *v.* Robertson, 4 T. R. 725. See Hoare *v.* Dawes, Dougl. 371; Coope *v.* Eyre, 1 H. Bl. 37; Smith *v.* Craven,

[1] The partnership is not liable for money loaned to the partner individually, though it was used for the purposes of the firm. Clark *v.* Taylor, 68 Ala. 453; Guice *v.* Thornton, 76 Ala. 466; Logan *v.* Bond, 13 Ga. 192; Lill *v.* Egan, 89 Ill. 609; Nat. Bank of Commerce *v.* Meader, 40 Minn. 325, 41 N. W. 1043; Farmers' Bank *v.* Bayliss, 41 Mo. 274; Nat. Bank of Salem *v.* Thomas, 47 N. Y. 15; Peterson *v.* Roach, 32 Oh. St. 374; Ah Lep *v.* Gong Choy, 13 Ore. 205, 9 Pac. 483; Union Bank *v.* Day, 12 Heisk. 413.

Accordingly, where one member of a commercial partnership took a note to collect (an act outside the scope of the partnership business) the firm was not liable, though the proceeds were applied to the payment of firm debts. The transaction of the owner of the note was with the individual partner. Pickels *v.* McPherson, 59 Miss. 216.

In the same way, when goods are sold to a partner individually the firm is not liable for the price, although the goods are used by the firm. Adams *v.* Eatherly Hardware

It must, however, be remembered, that this credit, to exonerate the other partners, must be given knowingly and voluntarily. For, if one sold goods actually to a firm, but through the agency of a partner whom he did not know to be a partner, and accordingly charged the same to that partner alone, the firm would still be bound. This rule applies equally to all simple contracts, whether oral or written. (*h*)

1 Cr. & J. 500; Bevan *v.* Louis, 1 Sim. 376; Wall's Adm. *v.* Fife, 37 Pa. 394. So where two parties agree to buy separately certain amounts of a specified kind of property, and then to form a partnership, each contributing his purchase to the firm, neither partner is liable for the purchase of the other, as for a partnership debt. McGar *v.* Drake, Sup. Ct. Tenn. 5 Reptr., 387. [Valentine *v.* Hickle, 39 Oh. St. 19.]

(*h*) It was held, in one case, in the Common Pleas in England, that there was a difference between a written and an oral contract, so far as regards the liability of a dormant partner to be sued thereon, and that, in an action upon the former, it was not allowable to add as parties other persons than those whose names were signed to the agreement. Beckham *v.* Knight, 4 Bing. N. C. 243. The facts of the case are sufficiently set forth in the opinions of the judges. Tindal, C. J.: "The action is brought on an express contract between Knight & Surgey of the one part, and the plaintiff of the other part. It appears by the plea that three persons were carrying on business under the firm of Knight & Surgey, and that the defendant Drake was a dormant partner. The agreement is in writing *inter partes;* and it contains no intimation that Knight & Surgey were carrying on business as members of a more extensive firm. I know of no authority for introducing the name of a dormant partner into such a contract. In implied contracts, where the benefit is equal, and the liability not limited, a dormant partner may be included; but there is no authority which extends the principle to express contracts." Bosanquet, J.: "The plaintiff is precluded, by the form of the contract, from saying that any other person entered into it besides himself and Knight & Surgey." See also Robinson *v.* Rudkins, Exch. 38 Eng. L. & Eq. 372. But Beckham *v.* Knight, *supra*, was afterwards overruled in the Exchequer. In Beckham *v.* Drake, 9 M. & W. 79, upon the same state of facts, Lord Abinger, C. B., said: "I am of the same opinion that I was then, that the doctrine stated by the Court of Common Pleas that, when a contract is in writing between parties signing their names to it, it cannot be used against other parties than those who signed their names to it, — cannot be supported either on principle or authority. That position, indeed, is contradicted by the whole series of authorities bearing on the subject. There is no question that a contract in writing by an agent, signed by himself, will bind his principal, when the other contracting party discovers the principal, although the contract was made without his knowing who the principal is; as, for instance, in the case of a bill of lading signed by the master, where the action is brought against the owners. It is also the case of every charter-party, which is signed by the owner, where the owner is rendered liable by the act of the master, because the master is his agent. So it is in a vast variety of other cases which frequently occur, all establishing the principle, that the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another. . . . A contract under

Co., 78 Ga. 485, 3 S. E. 430; Gates *v.* Watson, 54 Mo. 585; Harvey *v.* Childs, 28 Oh. St. 319; Holmes *v.* Burton, 9 Vt. 252.

In such cases the partner who thus becomes the debtor is of course entitled to a credit to that amount on the books of the partnership. Thornton *v.* Lambeth, 103 N. C. 86, 9 S. E. 432.

§ 89. **Partner Accepted as Creditor. Firm whether Discharged.** — The firm would not be held, if the creditor of the firm had accepted the individual security of the partner instead of the debt of the firm; provided the new individual indebtedness be of a higher nature than the firm debt, or payable sooner, or attended with some other advantage, which might be regarded as a consideration. (*i*) And a judgment obtained against one partner, whether

seal can bind none but those who sign and seal it. A contract not under seal is open to all the common-law requirements and incidents of a contract, whether in writing or not. Suppose these two partners, Knight & Surgey, had made a contract verbally, not having said a word about Drake; no question could then have arisen that Drake might nevertheless be liable upon it. How, then, does the fact of its being in writing, and of their having put their names to it, alter the case? The parties are just in the same situation, and there can be no difference. There is nothing affirmative on the face of the contract to show an intention to exclude everybody but themselves. It is open to the defendant Drake to show such an intention, but, unless it be shown, the objection does not arise." See Cooke *v.* Seeley, 2 Exch. 746. See, to the same effect, Snead *v.* Baringer, 1 Stew. 134; Reynolds *v.* Cleaveland, 4 Cow. 282; Mead *v.* Tomlinson, 1 Day, 148. The question as to whom the credit was given is one for the jury. Webster *v.* Stearns, 44 N. H. 498.

(*i*) As where the bond or other specialty of one partner is taken for the simple contract debt of the partnership, see Williams *v.* Hodgson, 2 H. & J. 474; Tom *v.* Goodrich, 2 Johns. 214; Clement *v.* Brush, 3 Johns. Cas. 180; Waugh *v.* Carriger, 1 Yerg. 31; Ward *v.* Motter, 2 Rob. (Va.) 536; Moule *v.* Hollins, 11 G. & J. 11; Jacobs *v.* McBee, 2 McMullan, 348; Bell *v.* Banks, 3 M. & G. 258; Ward *v.* Johnson, 13 Mass. 150; Patterson *v.* Brewster, 4 Edw. Ch. 352; McNaughten *v.* Partridge, 11 Ohio, 223. In United States *v.* Astley, 3 Wash. C. C. 512, Washington, J., said: "The reason upon which the doctrine is founded is obvious. The bond is clearly obligatory upon the parties who executed it, and is therefore an extinguishment of the simple contract debt as to him. A joint action, therefore, to recover on the original debt could not be supported against both partners. Neither could an action be maintained against the partner who did not execute the bond, because he has a right to insist that his partner should be joined with him in the action; of which right the creditor and the other partner cannot, without his consent, deprive him. It is precisely like the case of a release, which, if given to one joint debtor, discharges both. A bond given for a simple contract debt operates as a release of that debt, and creates another of a superior dignity, which can be enforced only against the person who executed the bond."

The above reasoning seems conclusive, and appears to place the doctrine in question upon a foundation entirely independent of the intentions of the parties. A different principle, however, is intimated in some of the authorities. Thus, in United States *v.* Lyman, 1 Mason, 505, 506, Story, J., says: "The doctrine, that in general a higher security taken from the debtor himself extinguishes the original contract, proceeds upon a presumption of law that it is taken in satisfaction of the original debt; for, if it appear otherwise upon the face of the security, it will not operate as an extinguishment. . . . It is, therefore, after all, a mere question of interest; and the law, in the absence of all other evidence of the interest, construes the higher security of the debtor himself as an extinguishment, because it gives a higher remedy. I admit, also, that a higher security by a third person, if taken at the time of making the original contract or afterwards, in satisfaction of the debt, operates as an extinguishment. But there is this difference between the case of a higher security of the debtor himself and of a third person, that, in the latter case, the law

the others be ostensible or secret, discharges the firm from liability to be sued for the same debt. (*l*)

does not presume the security taken in satisfaction, unless it is averred and proved to be the agreement of the parties so to consider it. Whether the receiving of a higher security from one partner for a partnership debt be an extinguishment, unless expressly taken in satisfaction of such debt, may perhaps admit of some doubt, notwithstanding the language of some highly respectable authorities." So in Bond *v.* Aitkin, 6 W. & S. 165, the language of the court is : " Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it. Wallace *v.* Fairman (4 Watts, 378). But where there is no antecedent debt, but the bond of one partner is taken at the time money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond as the only security contemplated ; *unless*, perhaps, there were strong and positive evidence to show an express agreement to the contrary by all parties." See Collier *v.* Leech, 29 Pa. 404. And where two partners agreed to borrow money for partnership purposes, and, upon its being loaned to them, one of them gave his sole bond for the amount, with the other as a witness, it was held, upon the insolvency of the firm, that the obligee might be admitted as creditor under a joint commission. *Ex parte* Brown, 1 Atk. 225, cited. See Horton *v.* Child, 4 Dev. 460 ; Ross *v.* Lawhorn, Dudley, 360 ; Doniphan *v.* Gill, 1 B. Mon. 199. See Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 234. But the ground upon which the rule is placed in the passage above quoted from Washington, J., certainly seems to be more consonant with the weight of the authorities. In Clement *v.* Brush, 3 Johns. Cas. 180, the understanding of the parties that the partnership was not to be released was evinced on the face of the specialty, which was taken by the creditor for the firm debt, by its being signed by the partner with the name of the firm. But the court said : " One partner cannot bind his copartner by seal. The defendant Brush, who executed it, is alone bound by the specialty ; and, it being a debt of a higher nature, it extinguishes the simple contract or partnership debt." So in Williams *v.* Hodgson, 2 H. & J. 474, and in McNaughten *v.* Partridge, 11 Ohio, 223.

(*l*) King *v.* Hoare, 13 M. & W. 494 ; Maule, J., in Bell *v.* Banks, 3 M. & G. 267 ; Lechmere *v.* Fletcher, 1 Cr. & M. 635 ; Trafton *v.* United States, 3 Story, 648, 651 ; United States *v.* Cushman, 2 Sumn. 437, 440 ; Pearce *v.* Kearney, 5 Hill, 82 ; Suydam *v.* Barber, 6 Duer, 34, 38 ; McMaster *v.* Vernon, 3 Duer, 249 ; Peters *v.* Sandford, 1 Denio, 224. See, however, Collier *v.* Leech, 29 Pa. 404. But this is not upon the ground that the creditor who thus obtains judgment against one partner alone thereby agrees, or is on that account presumed to agree, to release the other partners. If that were so, the presumption might be rebutted ; as, for instance, in the case of a secret partner, and the firm held, notwithstanding a prior judgment against one partner upon the same cause of action. But the real reason in case of a judgment, as well as of a bond, is, that the creditor, by taking the higher form of a judgment security against one partner for a debt *due jointly from all* the partners, thereby changes the relations and liabilities of the parties under the original contract, and cannot, therefore, afterwards hold them upon it, whatever may be his intention. Perhaps these two views of the effect of a creditor's taking the separate higher security of one partner for a partnership debt arise from a partnership's being regarded in two different lights. If a partnership be treated as a person, entirely distinct from the individual partners, then a contract between a creditor of the firm and one of the partners, by which the former receives from the latter, for a firm debt, his sole obligation of a higher nature, is *res inter alios acta*,

If a creditor of a firm has lost his remedy against the partnership by taking from one partner a security of a higher nature, it may not be quite determined whether equity will give relief; or, if it can, under what circumstances and in what manner this relief will be afforded. Perhaps the question, in each case, would be determined by the intention of the parties; for, if they purposed and desired to extinguish the joint debt and substitute an individual debt, neither equity nor law would keep the joint debt alive. It is held, in several cases, that it is no ground for the interposition of equity, that a creditor of a partnership has, in ignorance of a secret partner, extinguished his remedy at law against him by taking, for the debt of the firm, either a judgment against the ostensible partner, or his separate bond or specialty. (*m*) If, however, a partner attempts to bind the partnership by a specialty, but, failing for want of authority, binds himself only, and thereby discharges the partnership at law altogether, — equity will give relief against the other partner, if it be shown that the contract was really on the partnership account, and was intended by all parties to bind the firm. (*n*)

and may be said not to discharge the firm, unless clearly proved to have been intended by all the parties to have that effect. If, on the other hand, a partnership be considered simply as so many persons, who contract and are bound jointly, but in no other way, a person who has made a contract with the partnership, but who afterwards in some way absolves one of the partners from liability to be sued upon it together with the other partners, has thereby precluded himself from suing on the original contract, because by his own act he has deprived himself of the proper parties.

We have already seen that a judgment against an ostensible partner, upon a joint claim, though unsatisfied, and obtained during the concealment of the secret partner, is a bar to a subsequent suit upon the same cause of action brought against both the ostensible and the secret partners. Upon the same principles, the bond of an ostensible partner, taken for a partnership debt, extinguishes the claim as against a secret partner, who may be afterwards discovered. See a full discussion of this point in Ward *v.* Motter, 2 Rob. (Va.) 536; also, Anderson *v.* Levan, 1 W. & S. 334; Spear *v.* Gillet, 1 Dev. Eq. 466.

(*m*) Penny *v.* Martin, 4 Johns. Ch. 566; Willings *v.* Consequa, 1 Pet. C. C. 301; Williams *v.* Hodgson, 2 H. & J. 474; Smith *v.* Black, 9 S. & R. 142; How *v.* Kane, 2 Chand. 222; Ledam *v.* Williams, 4 McLean, 51. See Spear *v.* Gillet, 1 Dev. Eq. 466.

(*n*) Wharton *v.* Woodburn, 4 Dev. & Bat. 507; Blanchard *v.* Parteur, 2 Hayw. 393; James *v.* Bostwick, Wright, 142; Gunter *v.* Williams, 40 Ala. 561. See McKee *v.* Bank of Mt. Pleasant, 7 Ohio, 175. In McNaughten *v.* Partridge, 11 Ohio, 223, one partner executed a bond for a joint debt in the name of his firm, all the parties to this instrument and all the partners supposing, at the time, that the partnership was bound by such execution. It was held, that, on the ground of the mistake of the parties as to the legal effect of the execution of the bond, equity might relieve against the firm. But the obligee, having, after the discovery of the mistake, pursued his remedy against the executing partner individually, on the aforesaid bond, it was held, that this was a ratification of the arrangement by which the partnership had been discharged, and that equity could not now relieve. The doctrine in Virginia is thus set forth in

It has been argued that if there be no new consideration for the new promise, as all the partners were equally liable *in solido* for the firm debt, the new promise of any one of them to pay it, should, by itself alone, be no consideration for releasing the rest. (*o*) It is, however, the better doctrine, that it is for the jury to decide whether the creditor intended to accept the sole liability of a partner in discharge of the joint debt of the firm; for if there was such an intention, and no fraud, the new promise would be supported on the ground that the sole promise must have been more beneficial than the joint promise, or it would not have been accepted instead of the joint promise. (*p*) [1]

Nadnay *v.* Harvey, 9 Gratt. 466, by Daniel, J.: "It may, however, I think, be stated as the well-settled doctrine of this court, that whilst the mere acceptance of such higher security by a creditor from one member of a firm, for a partnership debt due by simple contract, destroys the right of the creditor to proceed at law against the member who was not a party in giving such higher security, yet that a court of equity will look at the original character of the debt, and will not withhold relief against the member not uniting in the higher security, merely because of the merger and destruction of the legal remedy against him; but will treat that simple contract as a debt still subsisting *in foro conscientiæ*, unless it is shown that the creditor intended, by accepting such higher security, to abandon all recourse upon his original demand. In other words, that in a court of law the higher security operates *per se* a destruction of the simple contract; but that, in a court of equity, whether such is to be the effect of the transaction, is a question to be decided by proof of the intention of the parties. If by taking such higher security it was not the design of the parties that the social debt should be wholly extinguished, equity will still hold all the partners bound. If, on the other hand, the higher security is given and accepted as a substitute for the original simple contract of the firm, and with the intention to absolve the firm, all remedy upon the latter is gone, in equity as well as at law." See Sale *v.* Dishman, 3 Leigh, 548; Galt *v.* Calland, 7 Leigh, 594; Weaver *v.* Tapscott, 9 Leigh, 424; Ward *v.* Motter, 2 Rob. (Va.) 552; Moser *v.* Libenguth, 1 Rawle, 255; Hart *v.* Withers, 1 Barr, 285, 290.

(*o*) Attwood *v.* Banks, 2 Beav. 192; Lodge *v.* Dicas, 3 B. & Ald. 611; Livingston *v.* Radcliff, 6 Barb. 201; David *v.* Ellice, 5 B. & C. 196; Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 Hill, 448; Wildes *v.* Fessenden, 4 Met. 12, Frentress *v.* Marble, 2 Greene (Ia.), 553. See Pierce *v.* Cameron, 7 Rich. 114; Stone *v.* Chamberlin, 20 Ga. 259. If a creditor of the firm, after dissolution, knowing that one or more of the partners have agreed to assume and pay the firm debts, accepts the note of those agreeing to pay, in payment of his debt, it is a discharge of the other partners. Millerd *v.* Thorn, 56 N. Y. 402. So where each partner gives his note for his share of a debt, it is a discharge of the partnership debt. Maxwell *v.* Day, 45 Ind. 509.

(*p*) Thus it was said by Denman, C. J., in Thompson *v.* Percival, 5 B. & Ad. 925: "Many cases may be conceived in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry."

[1] It is now everywhere admitted that where a partnership creditor accepts the note of a partner in satisfaction of the claim against the firm, the firm debt is gone. The

From the language used in some cases, it might be inferred that the taking of a new security of the same class from one partner for a partnership debt is of itself sufficient to extinguish the partnership debt, and to discharge the firm. But the principle now applied, both in England and generally in this country, is, that the acceptance by a creditor of the firm of one partner's separate security of the same class with the joint security (as of a partner's promissory note for the firm debt), does not discharge the other partners unless an express or implied agreement that such shall be the effect of the transaction is clearly made out.(*q*)[1]

Kirwan *v.* Kirwan, 2 Cr. & M. 617, 623; Hart *v.* Alexander, 2 M. & W. 484; Waydell *v.* Luer, 3 Denio, 410; Livingston *v.* Radcliff, 6 Barb. 301; Van Eps *v.* Dillage, 6 Barb. 244; also, Harris *v.* Lindsay, 4 Wash. C. C. 271; Marshall, C. J., in Shelby *v.* Mandeville, 6 Cranch, 264; *Ex parte* Liddiard, 4 Deacon & Ch. 603; Oakeley *v.* Pasheller, 10 Bligh, 548; Anderson *v.* Henshaw, 2 Day, 272; Thomas *v.* Shillibeer, 1 M. & W. 124. The principle of these latter cases seems also to have been asserted in Evans *v.* Drummond, 4 Esp. 92, and in Reed *v.* White, 5 Esp. 122. In the former, Lord Kenyon said: "Is it to be endured, that, when partners have given their acceptance, and when perhaps one of two partners has made provision for the bill, the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion, that, when the holder chooses to do so, he discharges the other partner." Acceptance by a firm creditor of a note made by the surviving partner, who had been authorized to take this in liquidation, does not discharge the estate of the deceased partners. Titus *v.* Todd, 25 N. J. Eq. 458.

(*q*) *Ex parte* Hodgkinson, 19 Ves. 295;

partner is really a third party, the true debtor being the firm; and it is well settled that a debt is discharged by accepting in payment of it the note of a third person. In addition to the authorities collected in note (*p*) see the following cases. Thompson *v.* Percival, 5 B. & Ad. 925; *In re* Parker, 19 N. B. R. 340; Myatts *v.* Bell, 41 Ala. 222; Bonnell *v.* Chamberlin, 26 Conn. 487; Maxwell *v.* Day, 45 Ind. 509; Drake *v.* Hill, 53 Ia. 37; Crooker *v.* Crooker, 52 Me. 267; Washburn *v.* Pond, 2 All. 474; Ludington *v.* Bell. 77 N. Y. 138; Bank *v.* Green, 40 Oh. St. 431; Robinson *v.* Hurlburt, 34 Vt. 115; Dages *v.* Lee, 20 W. Va. 584; Gates *v.* Hughes, 44 Wis. 332.

If, however, the note of a partner is taken in payment of an existing firm debt, it will be presumed (in the absence of proof of an agreement to discharge) to be mere conditional payment, and if the new note is not paid at maturity the liability of the firm remains.

In re Clap, at 2 Low. 226; Leabo *v.* Goode, 67 Mo. 126; Titus *v.* Todd, 25 N. J. Eq. 458; Claflin *v.* Ostrom, 54 N. Y. 581; Leach *v.* Church, 15 Oh. St. 169; Spaulding *v.* Ludlow Mills, 36 Vt. 150; Miller *v.* Miller, 8 W. Va. 542.

This is true even if the new note was given by an ostensible sole trader who in fact had a dormant partner; on discovering that fact, the creditor may sue on the original claim, the new note remaining unpaid. Robinson *v.* Wilkinson, 3 Price, 508; Parker *v.* Canfield, 37 Conn. 250; Schemerhorn *v.* Loines, 7 Johns. 311; Hill *v.* Voorhies, 22 Pa. 68; Nichols *v.* Cheairs, 4 Sneed, 229.

[1] If at the time a debt arises against the firm the note of a partner is taken, not to make him the debtor, but as collateral security or conditional payment, the firm is bound. Bottomley *v.* Nuttall, 5 C. B. N. S. 122; Smith *v.* Collins, 115 Mass. 388; Sage *v.* Sherman, 2 N. Y. 417; Bowers *v.* Still, 49 Pa. 65; Schollenberger *v.* Seldon-

§ 90. **Use of Firm Property for Private Purposes.** — Instances of partners using the name or credit of the firm for their personal advantage, and without authority, are constantly occurring; and, as we have seen, when this is known to the person dealing with them, the firm are not held. Some difficulty often arises as to the proof of such knowledge on the part of the creditor. There is a rule, however, which rests on strong authority, and is in itself reasonable, just, and convenient, which would settle most of these cases, or at least reduce them to mere questions of fact. It is, that whenever a party receives from any partner, in payment for a debt due from that partner only, whether the debt be created at the time or before existing, or by way of settlement of or security for a debt, the indebtedness or obligation of the firm in any form, the presumption of the law is, that the partner gives this and the creditor receives it in fraud of the partnership, and has consequently no demand upon them. (*r*) And upon the

Harris *v.* Farwell, 15 Beav. 31; Winter *v.* Innes, 4 Myl. & Cr. 101; Davis *v.* Desauque, 5 Whart. 530; Smith *v.* Rogers, 17 Johns. 340; Parker *v.* Cousins, 2 Gratt. 372; Mason *v.* Wickersham, 4 W. & S. 100; Yarnell *v.* Anderson, 14 Mo. 619; Potter *v.* McCoy, 26 Pa. 458; Hill *v.* Voorhies, 22 Pa. 68; Nichols *v.* Cheairs, 4 Sneed, 229. And even in those States, where, as in Maine, Massachussetts, and Vermont, the taking of a negotiable note or bill is regarded as *prima facie* evidence of payment of the debt, it may be believed that the acceptance by a partnership creditor of such separate security would not discharge the firm, unless it were clearly shown that such was the intention of the parties. Barker *v.* Blake, 11 Mass. 20, 21. See also Melledge *v.* B. Iron Co., 5 Cush. 170; Fowler *v.* Ludwig, 34 Me. 455; Tracy *v.* Pearl, 20 Vt. 162; Heald *v.* Warren, 22 Vt. 410. The security of one or more of the partners for a firm debt is more frequently taken by a creditor where the partnership is dissolved by the retirement of one or more of its members. See § 324 *et seq.* for a more detailed examination of the cases.

(*r*) Hope *v.* Cust, cited in Shirreff *v.* Wilks, 1 East, 48; Ridley *v.* Taylor, 13 East, 175; Green *v.* Drakin, 2 Stark. 347; *Ex parte* Goulding, 2 Glyn & J. 118; Heath *v.* Sansom, 2 B. & Ad. 291; *Ex parte* Thorpe, 3 Mont. & Ayr. 716; Wintle *v.* Crowther, 1 Cromp. & J. 316; Snaith *v.* Burridge, 4 Taunt. 684; *Ex parte* Agace, 2 Cox, 312; Davenport *v.* Runlett, 3 N. H. 386; Greeley *v.* Wyeth, 10 N. H. 15; Williams *v.* Gilchrist, 11 N. H. 535; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Ten Eyck, 2 Johns. 300; Livingston *v.* Roosevelt, 4 Johns. 251; Dob *v.* Halsey, 16 Johns. 34; Foot *v.* Sabin, 19 Johns. 154; Laverty *v.* Burr, 1 Wend. 529; Whitaker *v.* Brown, 11 Wend. 75; Gansevoort *v.* Williams, 14 Wend. 133; Wilson *v.* Williams, 14 Wend. 146; Chazournes *v.* Edwards, 3 Pick. 5; Rogers *v.*

ridge, 49 Pa. 83; Maffet *v.* Leuckel, 93 Pa. 468; Barcroft *v.* Snodgrass, 1 Cold. 430; Hoeflinger *v.* Wells, 47 Wis. 628, 3 N. W. 589.

According to the better view in these cases, the firm is not discharged even if the creditor has pursued his remedy against the partner to judgment, or has proved against the partner in bankruptcy; the claim against the partner being merely cumulative. Bottomley *v.* Nuttall, 5 C. B. N. S. 122; Claflin *v.* Ostrom, 54 N. Y. 581; First Nat. Bank *v.* Morgan, 73 N. Y. 593. But see *In re* Herrick, 13 N. B. R. 312.

same principle, if one partner releases a debt due to his firm, in consideration of a release to him of a debt due by him solely, the presumption will be that the transaction was fraudulent. (*s*) [1]

Batchelor, 12 Pet. 221; Baird *v.* Cochran, 4 S. & R. 397; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Wead *v.* Richardson, 2 Dev. & B. 535; Pierce *v.* Pass, 1 Porter, 232; Mauldin *v.* Branch Bank, 2 Ala. 511; Hagar *v.* Mounts, 3 Blackf. 57, 261; Hickman *v.* Reineking, 6 Blackf. 388; Lanier *v.* M'Cabe, 2 Fla. 32; Clay *v.* Cottrell, 18 Pa. 408; King *v.* Faber, 22 Pa. 21; Darling *v.* March, 22 Me. 184; Elliott *v.* Dudley, 19 Barb. 326; Miller *v.* Hines, 15 Ga. 197. See Leveson *v.* Lane, 13 C. B. N. S. 278; Williams *v.* Brimhall, 13 Gray, 462; Casey *v.* Carver, 41 Ill. 228; Rutledge *v.* Squires, 23 Ia. 53.

The purchaser of goods from a firm cannot plead, in payment or set-off, a debt due him from one of the firm. Wise *v.* Copley, 36 Ga. 508. Nor can a creditor of a partner, by an attachment and sale of firm property, on execution, for his private debt, acquire title as against the creditors of the firm. Miner *v.* Pierce, 38 Vt. 610. A sale by a partner of part of the firm property, the proceeds to be applied to the private account of the partner, is fraudulent as against the other partners, and gives the purchaser no title as against them. Williams *v.* Barrett, 10 Kas. 455; Stegall *v.* Coney, 49 Miss. 761. If a partner fraudulently appropriate the funds of a firm to the purchase of real estate, or to the payment of life-insurance premiums on a policy for the benefit of his wife, a court of equity will follow the funds and their proceeds, and appropriate them to the use of the firm. Shaler *v.* Trowbridge, 28 N. J. Eq. (Stewart) 595. One who takes, in payment of the individual note of A., for his private debt, notes payable to A., but belonging to the firm of which he was a member, has a good title, if he was ignorant of the fact of partnership. Kellogg *v.* Fancher, 23 Wis. 21. The banker of a firm who knowingly transfers funds of the firm to the private account of one of the firm, for the purpose of speculation, is liable to the other partners for the funds so transferred. Billings *v.* Meigs, 53 Barb. 272. And, generally, a partner cannot use partnership funds or credits to pay his private debts, or promote his private interests. McNair *v.* Platt, 46 Ill. 211; Broadus *v.* Evans, 63 N. C. 633; Downing *v.* Linville, 3 Bush, 472; Wise *v.* Copley, 36 Ga. 508.

(*s*) Evernghim *v.* Ensworth, 7 Wend. 326; Gram *v.* Cadwell, 5 Cow. 489; Farrar *v.* Hutchinson, 9 A. & E. 641; Greeley *v.* Wyeth, 10 N. H. 15. If a firm is sued upon a note given in the partnership name, partly for a partnership debt and partly for the separate debt of one or more of the partners, it seems that the firm is liable so far as the note is founded upon a partnership consideration. Wilson *v.* Lewis, 2 Man. & G. 197; Barker *v.* Burgess, 3 Met. 273. See Barber *v.* Backhouse, 1 Peake, 61; Wintle *v.* Crowther, 1 Cromp. & J. 316; *Ex parte* Kirby, Buck, 511.

[1] A partner has no authority to dispose of partnership property in payment of an individual debt; and a creditor of the partner taking such property has no right to hold it against the partnership, whether he claims absolute title, or holds the property by way of mortgage or pledge. Snaith *v.* Burridge, 4 Taunt. 684; Rogers *v.* Batchelor, 12 Pet. 221; Kelley *v.* Greenleaf, 3 Story, 93; Moline Wagon Co. *v.* Rummell, 12 F. R. 658; Claflin *v.* Bennett, 51 F. R. 693; Halstead *v.* Shepard, 23 Ala. 558; Nall *v.* McIntyre, 31 Ala. 532; Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676; Nichol *v.* Stewart, 36 Ark. 612; Brewster *v.* Mott, 5 Ill. 378; Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854; Johnson *v.* Crichton, 56 Md. 108; Kingsbury *v.* Tharp, 61 Mich. 216, 28 N. W. 74; Hinds *v.* Backus, 45 Minn. 170, 47 N. W. 655; Buck *v.* Mosley, 24 Miss. 170; Hoff *v.* Rogers, 67 Miss. 208, 7 So. 358; Hilliker *v.* Francisco, 65 Mo. 598; Forney *v.* Adams, 74 Mo. 138; Dob *v* Halsey, 16 Johns. 34; Geery *v.* Cockroft, 33 N. Y. Super. 146; Hartness *v.* Wallace, 106 N. C. 427, 11 S. E. 259; Tanner *v.*

§ 91. **Good if authorized.** — The presumption of fraud in these cases is never absolute. It may be rebutted by proof of the

Hall, 1 Barr, 417; Hartley *v.* White, 94 Pa. 31; McNair *v.* Wilcox, 121 Pa. 437, 15 Atl. 575; Goode *v.* McCartney, 10 Tex. 193. See Jones *v.* Yates, 9 B. & C. 532; Feucht *v.* Evans, 52 Ark. 217; Daniel *v.* Daniel, 9 B. Mon. 195; Bourne *v.* Wooldridge, 10 B. Mon. 492; Cadwallader *v.* Kroesen, 22 Md. 200.

This is true, even if he was ignorant of the fact that it was partnership property. Rogers *v.* Batchelor, 12 Pet. 221; Janney *v.* Springer, 78 Ia. 617, 43 N. W. 461; Minor *v.* Gaw, 11 Sm. & M. 322; Buck *v.* Mosley, 24 Miss. 170; Ackley *v.* Staehlin, 56 Mo. 558; Caldwell *v.* Scott, 54 N. H. 414; Binns *v.* Waddill, 32 Gratt. 588 (*semble*); Liberty Savings Bank *v.* Campbell, 75 Va. 534.

But see Locke *v.* Lewis, 124 Mass. 1. If, however, the partner has been so intrusted with the property by his copartners as to appear to be sole owner, a different question is presented. See *post*, § 99.

If all the partners assent to the transfer, the individual creditor of the partner gets a valid title. McGhees *v.* McCutchen, 82 Ga. 788, 9 S. E. 785; Veal *v.* Keely Co., 86 Ga. 130, 12 S. E. 297; Fargo *v.* Ames, 45 Ia. 491; Rhodes *v.* McKean, 55 Ia. 547, 8 N. W. 359; *In re* Stewart, 62 Ia. 614, 17 N. W. 897; Schmidlapp *v.* Currie, 55 Miss. 597; Sexton *v.* Anderson, 95 Mo. 373, 8 S. W. 564; Pepper *v.* Peck (R. I.), 20 Atl. 16; Carver Gin & Mach. Co. *v.* Bannon, 85 Tenn. 712, 4 S. W. 831; Hage *v.* Campbell, 78 Wis. 572, 47 N. W. 179.

And if the firm has in this way assumed an individual debt, one partner may give a firm-note in payment of it. Randall *v.* Hunter, 66 Cal. 512.

The burden is on the individual creditor to show assent of all the partners. Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888; Mechanics' & Traders' Ins. Co. *v.* Richardson, 33 La. Ann. 1308; Mutual Nat. Bank *v.* Richardson, 33 La. Ann. 1312; Davis *v.* Smith, 27 Minn. 390, 7 N. W. 731; Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326.

And mere silence on the part of the other partners is not enough to prove assent. Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888; nor does assent without full knowledge of the facts, amount to ratification, American Exchange Nat. Bank *v.* Georgia Const. & Inv. Co., 87 Ga. 651, 13 S. E. 505. Nor will a representation by the partner of the consent of his copartners cure the defect. Allen *v.* Cary, 33 La. Ann. 1455; Union Nat. Bank *v.* Underhill, 102 N. Y. 336, 7 N. E. 293.

So where a partner releases a debt due to the firm on consideration of the transfer of property or other advantage to the partner individually, the release does not bind the firm. Lemiette *v.* Starr, 66 Mich. 539, 33 N. W. 832; Beatson *v.* Harris, 60 N. H. 83; Clift *v.* Moses, 112 N. Y. 426, 20 N. E. 392.

And a partner cannot bind the firm by a consent to set off a debt due from him to a stranger against a debt owed by the stranger to the firm. Cowen *v.* Eartherly Hardware Co., (Ala.) 11 So. 195. Thomas *v.* Stetson, 62 Ia. 537, 17 N. W. 751; Chase *v.* Buhl Iron Works, 55 Mich. 139, 20 N. W. 827; see Atkin *v.* Berry, 1 Lea, 91.

Therefore where both the firm and an individual partner owe the same creditor, a firm check cannot with consent of the partner be applied to the debt of the latter. Cornells *v.* Stanhope, 14 R. I. 97.

And where one partner used firm assets to pay off a mortgage on his wife's land, it was held that the firm could charge the land with the amount of the mortgage. Brecher *v.* Fox, 1 F. R. 273.

Upon the same principle, one partner cannot subject the partnership assets to the individual debt of the other partner to him. Evans *v.* Bryan, 95 N. C. 174.

So where a partner, being an individual debtor, gives firm paper in payment of his debt, the creditor, or one with notice, cannot enforce payment against the partnership. Guice *v.* Thornton, 76 Ala. 466; American Exchange Nat. Bank *v.* Georgia Const. & Inv. Co., 87 Ga. 651, 13 S. E. 505; Mechanics' & Traders' Ins. Co. *v.* Richardson, 33

authority given by the other partners, or of their knowledge and consent, or their ratification; and these, or either of them, may be express, or be inferred from their acts, or usage, or any circumstances which reasonably imply them. (*t*) The presumption seems to be held much more strongly in this country than in England. There, indeed, the courts would seem to hold, that, if the name of the partnership be used by a partner even for his private debt, the partners will be held, unless they can show covin or fraud on the part of the holder; and the mere fact that it was the private debt of one partner to him will not amount to *primâ facie* proof of this. (*u*) In a recent English case, in a suit on a

(*t*) Frankland *v.* M'Gusty, 1 Knapp, Pr. C. 274; *Ex parte* Bonbonus, 8 Ves. 540; *Ex parte* Thorpe, 3 Mont. & A. 716; Gansevoort *v.* Williams, 14 Wend. 133; Wilson *v.* Williams, 14 Wend. 146; Cotton *v.* Evans, 1 Dev. & B. Eq. 295; Noble *v.* M'Clintock, 2 W. & S. 152; Pierce *v.* Pass, 1 Port. 232; Brewster *v.* Mott, 5 Ill. 378; Jones *v.* Booth, 10 Vt. 268; Miller *v.* Hines, 15 Ga. 197; Darling *v.* March, 22 Me. 184. See Corbin *v.* McChesney, 26 Ill. 231; Warren *v.* Dickson, 30 Ill. 363; Sternburg *v.* Callaman, 14 Iowa, 251, adopted and confirmed in Cadwallader *v.* Blair, 18 Iowa, 420; Carver *v.* Dows, 40 Ill. 374; Wise *v.* Copley, 36 Ga. 508. But proof of knowledge that the indebtedness or obligation of the partnership had been applied by one partner to pay his own debt is not proof of consent to or satisfaction of such misapplication by the other partners, so as to rebut the presumption of fraud in the creditor. *Ex parte* Agace, 2 Cox, 312; Elliott *v.* Dudley, 19 Barb. 326.

(*u*) Compare Ridley *v.* Taylor, 13 East, 175; Frankland *v.* M'Gusty, 1 Knapp. Pr. C. 274; *Ex parte* Agace, 2 Cox, 312; *Ex parte* Bonbonus, 8 Ves. 540; *Ex parte* Thorpe, 3 Mont. & A. 716; Musgrave *v.* La. Ann. 1308; Blodgett *v.* Sleeper, 67 Me. 499; Daniels *v.* Hammond, 154 Mass. 165, 28 N. E. 12; Freeman *v.* Ellison, 37 Mich. 459; Howell *v.* Sewing Machine Co., 12 Neb. 177, 10 N. W. 700; Union Nat. Bank *v.* Underhill, 102 N. Y. 336, 7 N. E. 293; Graham *v.* Taggart, (Pa.) 11 Atl. 652.

This is the case where the note of a new firm is given in renewal of a note of the old firm it succeeded, by one who was partner in both firms. Tyree *v.* Lyon, 67 Ala. 1. And where a partner indorsed his individual note with the firm name, and discounted it for his individual purposes. Newman *v.* Richardson, 9 F. R. 865; Nat. Bank of Commerce *v.* Law, 127 Mass. 72. See Atlas Nat. Bank *v.* Savery, 127 Mass. 75.

But a holder of a firm note for value and without notice could of course recover. Redlon *v.* Churchill, 73 Me. 146; Nichols *v.* Sober, 38 Mich. 678.

So where one partner borrowed money to put into the firm as his capital, and gave a firm note for it, the lender cannot hold the firm on the note if he had notice of the facts at the time of taking the note. Coller *v.* Porter, 88 Mich. 549, 50 N. W. 658; McNaughton's Appeal, 101 Pa. 550. See Goodbar *v.* Cary, 16 F. R. 316.

As a partner cannot pay his own individual debt with the firm assets, so he cannot thus pay the debt of his partner without the consent of all partners, including the debtor. Brewster *v.* Reel, 74 Ia. 506, 38 N. W. 381.

A partner cannot give away the firm property to a volunteer, Daniel *v.* Daniel, 9 B. Mon. 195. And for this reason he cannot make a valid surrender of a firm lease, unless in an exigency of the business, when the other partner is not accessible. Bergland *v.* Frawley, 72 Wis. 559, 40 N. W. 372. So one who receives a gift of a firm note from a partner cannot sue the firm on it. Lobdell *v.* Slawson, 90 Mich. 201, 51 N. W. 349.

bill of exchange accepted by a partner in the name of the firm, which bill included with the debt of the firm a private debt of the partner, the court directed a verdict for only the amount that was due from the firm. (*uv*) We shall, in a future chapter, speak of this question more fully in regard to negotiable paper.[1]

If a partner makes a fraudulent use of the name or property of his firm, it should be clearly and immediately repudiated by them as soon as it comes to their knowledge; and any long delay may work a ratification. (*uuu*)

§ 92. **Beginning of Liability.** — It is sometimes important, in reference to liability for debt, as in other respects, to determine when a partnership begins. For example, if a man orders goods sent to another, and they are so sent and charged to the first party, and the seller discovers that the orderer and receiver were partners in the transaction, both are liable. But if the goods were to be supplied to the receiver by the orderer, and manufactured on certain terms by the party receiving them, and the new prod-

Drake, 5 Q. B. 185; with Davenport *v.* Runlett, 3 N. H. 386; Lansing *v.* Gaine, 2 Johns. 305; Dob *v.* Halsey, 16 Johns. 34; Gansevoort *v.* Williams, 14 Wend. 133; Chazournes *v.* Edwards, 3 Pick. 5; Rogers *v.* Batchelor, 12 Pet. 221; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Pierce *v.* Pass, 1 Port. 232. In Dob *v.* Halsey, *supra*, Spencer, J., said: "The only difference between the decision of this court and that of the King's Bench consists in this: We require the separate creditor, who has obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound. The rule of the King's Bench throws the burden of avoiding such security on the firm, by requiring them to prove that the act was covinous on the part of the partner for whose private debt the paper of the firm was given, by showing that it was done without the knowledge, and against the consent, of the other partners, and that the fact was known to the separate creditor when he took the paper of the firm." In Rogers *v.* Batchelor, 12 Pet. 221, the question was raised whether it made any difference that at the time of the transaction the separate creditor had no knowledge that there was a misappropriation of the partnership funds. Judge Story said: "It is true that the precise point now before us does not appear to have received any direct adjudication; for in all the cases above mentioned there was a known application of the funds or securities of the partnership to the payment of the separate debt. But we think that the true principle to be extracted from the authorities is, that one partner cannot apply the partnership funds or securities to the discharge of his own private debt without their consent; and that without their consent their title to the property is not divested in favor of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition of it or not." Brewster *v.* Mott, 5 Ill. 378. See the language of Spencer, J., in Dob *v.* Halsey, 16 Johns. 39. It was distinctly adjudged in Achley *v.* Stachlin, 56 Mo. 558, that the fact that a creditor had no knowledge was immaterial. [See *ante*, § 90, *note*.]

(*uv*) Ellston *v.* Deacon, L. R. 2 C. P. 20.

(*uuu*) Marine Co. of Chicago *v.* Carver, 41 Ill. 66; Casey *v.* Carver, 41 Ill. 225.

[1] *Post*, § 133 *et seq.*

ucts when manufactured (and not before) were to be the joint property of the two as partners, then the receiver of the goods would not be liable. (*v*)

The general principle which answers the question when a partnership begins, for the purpose and with the effect of casting upon the members of the firm the liability of partners, must of course be that the liability of persons on contracts not made by themselves, and as partners, begins at the moment when they begin to have a joint interest in the contracts as partners. For if a person purchases goods or borrows money upon his own credit, and it is afterwards discovered that the goods or the money have been applied to the use of a partnership of which he is a member, the firm will be liable for the price of the goods or the amount of the loan, if, from the nature and circumstances of the transaction, the firm may be regarded as the real purchaser or borrower, which has acted through its authorized agent; otherwise, only the party to whom credit was actually given can be held. Suppose there is no partnership in contemplation at the time goods are sold or money is loaned. In such case, though the money or the goods subsequently go to the use of a copartnership, of which the visible contracting party is a member, there can be no pretence for holding the firm liable, since, at the time of the formation of the contract, it had no existence even in intention. (*w*)

(*v*) Gardiner *v.* Childs, 8 C. & P. 345; Broune *v.* Gibbins, 5 Bro. P. C. 491 (Dublin ed.), 3 Bro. P. C. 127.

(*w*) Such was the case of Young *v.* Hunter, 4 Taunt. 582. Hunter & Rayney had purchased goods of the plaintiffs and other persons, which they intended to ship for the Baltic; and the defendants, Hoffham & Co., who were not otherwise partners of Hunter & Co., were afterwards allowed to join in the adventure, and to have a fifth share upon the goods being put on board. The plaintiffs knew nothing of Hoffham & Co., but sold the goods to Hunter & Co. only. It was held that Hoffham & Co. were not liable to pay for the goods. Heath, J.: "The proposition of the plaintiffs, that, if it be shown that at any one period of the transaction there was a partnership subsisting, it was therefore to be inferred that there had been a partnership in the original purchase is wholly unfounded."

On the other hand, if parties have agreed to be partners for the prosecution of a joint adventure, and one of them with the view pledges his credit for his allotted contribution to the joint capital, he only can be made liable upon the contract, unless, at the time of making it, the partnership was in existence and capable of being a contracting party. And hence, if by the parties' agreement the beginning of the partnership appear clearly dependent upon some act or event subsequent to the making of the contract in question, the possibility of the firm's being liable thereon is at once excluded. This proposition is illustrated by the case of Saville *v.* Robertson, 4 T. R. 720. In that case Lord Kenyon said: "The facts of the case are shortly these: several persons who had no general partnership, nor any connection with each other in trade, formed an adventure to the East Indies. The outfit of the vessel was a joint concern of all the partners; and that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship, which is admitted to be a partnership concern. But beyond

§ 93. **Partner by holding out.** — We have already seen that one may be liable as a partner who is not so in fact, if he suffers him-

that I see no partnership between the parties till all the parcels of the cargo were delivered on board; and that made it a combined adventure between all the parties. I cannot, therefore, see how it can be said that these goods, which were sold to Pearce only, and on his sole credit and account, were sold and delivered on the partnership account. Afterwards, indeed, these defendants were to gain or lose by the joint cargo: when the other goods were brought in, the partnership arose; but each was to bring in his own particular stock. But in this case I think that the question stops short of affecting the defendants, and I cannot see how the plaintiff can have a right to call on the defendants, as partners, for the value of these goods, on a supposed contract, when the real contract between the buyer and seller was consummated before the joint risk began." The case of Post *v.* Kimberly, 9 Johns. 470, is somewhat analogous in its facts, and exemplifies the same principle. See Ward *v.* Thompson, 1 Newb. Adm. 95, where, however, the question arose between the partners: Spalding *v.* Hedges, 2 Barr, 240, 243; Dunham *v.* Rogers, 1 Barr, 255. On the other hand, Gouthwaite *v.* Duckworth, 12 East, 421, is a case in which, from the character of the agreement between the parties, the partnership was deemed to be in no way dependent for its beginning upon any commingling of the several partners' contributions, nor upon any other appropriation thereof to the joint fund; but to have been in existence at the time of and for the purpose of the purchase of such contributions. Lord Ellenborough, C. J., there said: "It comes to the question, whether, contemporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as Duckworth states in his examination, *for the adventure;* that was the agreement. Then what was this adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share? The case of Saville *v.* Robertson does indeed approach very near to this; but the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased, in pursuance of the agreement *for the adventure,* of which it had been before settled that Duckworth was to have a moiety. . . . If all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same, for this purpose, as if all the names had been announced to the seller, and therefore all are liable for the value of them." So in Everitt *v.* Chapman, 6 Conn. 347. There A., B., & C. were in partnership in the business of tanning hides, under an agreement by which A. was to furnish hides for one-half of the stock, and was to receive and make market for one-half of the leather, and B. & C. were to furnish the other half of the stock, and to make market for the other half of the leather; each of the partners to purchase on his own separate credit. B. bought hides of the plaintiff, which were charged to him individually. But, afterwards discovering the partnership, the plaintiff brought his action against A., B., & C. It was held, that the firm were liable for the value of the hides. The court cited Gouthwaite *v.* Duckworth, *supra,* and, commenting on Saville *v.* Robertson, referred to by the defendants, said: "This authority, then, is so far from justifying the defence, that it vindicates the claim of the plaintiff; for these defendants *were in partnership* when the hides were purchased — *they were bought for the concern* — they were delivered into their tannery — they went to their joint benefit, having been purchased by H. R. Mott, without disclosing the names of his copartners." See also, to the same effect, a *dictum* of Gibbs, J., in Young *v.* Hunter, 4 Taunt. 583; Brooke *v.* Evans, 5 Watts, 196; Griffith *v.* Buffum, 22 Vt. 181. In Wilson *v.* Whitehead, Ackerman & Carleton, 10 M. & W. 503,

self to be held out to the world as a partner.[1] The reason is obvious. Any person may lend his credit to another, as he may lend his money or property; and if he chooses to lend his credit

the action was assumpsit for goods sold and delivered to the defendant, Whitehead, to be used in printing the "Sporting Review." To establish the joint liability with him of Ackerman & Carleton, a verbal agreement between the three was proved that they should bring out and be jointly interested in the "Sporting Review;" Ackerman was to be the publisher, and to make and receive general payments, Carleton to be the editor, and Whitehead the printer; and, after payment of all expenses, the three were to share the profits of the publication equally. Whitehead was to furnish the paper for the work, and to charge it to the account at cost price, and was also to charge the printing at "master's prices." On this evidence the court directed a nonsuit, on the ground that the other defendants were not jointly liable with Whitehead in this action, giving the plaintiffs leave to move to enter a verdict for the admitted value of the paper. On the hearing of the motion, Parke, B., said: "The question is, Did the other defendants authorize Whitehead to purchase the paper on their account, or on his own? It appears to me, on the true construction of the contract, that the latter was the case. When the paper was in his possession, he was at liberty to have appropriated it to any other purpose than to the 'Sporting Review.'" That is, from the nature of the agreement between the parties, it was apparent that, contemporary with the purchase of the goods in question, there was no joint interest in them on the part of the defendants; but their joint interest therein arose subsequent to the contract of sale, and only after some act had been performed by Whitehead by which the paper was appropriated to the use of the partnership." See Barton *v.* Hansom, 2 Taunt. 49; Aspinwall *v.* Williams, 1 Ohio, 38; Austin *v.* Williams, 1 Ohio, 282. Of course the same considerations are applicable where, in pursuance of an agreement to prosecute an adventure in company, one or more of the partners, on his own credit, borrows money, and puts it into the firm as his contribution to the joint fund. Smith *v.* Craven, 1 Cr. & J. 500.

[1] *Ex parte* Broome, 1 Rose, 69; De Berkom *v.* Smith, 1 Esp. 29; Goode *v.* Harrison, 5 B. & Ald. 147; Baird *v.* Planque, 1 F. & F. 344; Edmundson *v.* Thompson, 2 F. & F. 564; Kirkwood *v.* Cheetham, 2 F. & F. 798; Gurney *v.* Evans, 3 H. & N. 122; Martyn *v.* Gray, 14 C. B. N. S. 824; Doubleday *v.* Muskett, 7 Bing. 110; Lake *v.* Argyll, 6 Q. B. 477; Collingwood *v.* Berkeley, 15 C. B. N. S. 145; Maddick *v.* Marshall, 16 C. B. N. S. 387, 17 C. B. N. S. 829; Buckingham *v.* Burgess, 3 McLean, 364; *In re* Jewett, 15 N. B. R. 126; *In re* Krueger, 2 Low. 66; Schlapback *v.* Long, 90 Ala. 525, 8 So. 113; Bowie *v.* Maddox, 29 Ga. 285; Carmichael *v.* Greer, 55 Ga. 116; Fisher *v.* Bowles, 20 Ill. 396; Sherrod *v.* Langdon, 21 Ia. 518; Walrath *v.* Viley, 2 Bush, 478; Palmer *v.* Pinkham, 33 Me. 32; Potter *v.* Greene, 9 Gray, 309; Rice *v.* Barrett, 116 Mass. 312; Mershon *v.* Hobensack, 2 Zab. 372; McStea *v.* Matthews, 50 N. Y. 166; Reber *v.* Col. Machine M'f'g Co., 12 Oh. St. 175; Speer *v.* Bishop, 24 Oh. St. 598; Drennen *v.* House, 41 Pa. 30; Furber *v.* Carter, 11 Humph. 271; Cushing *v.* Smith, 43 Tex. 261; Harris *v.* Crary, 67 Tex. 383, 3 S. W. 316; Stearns *v.* Haven, 14 Vt. 540; Mathews *v.* Felch, 25 Vt. 536; Wait *v.* Brewster, 31 Vt. 516.

This principle is applicable where one represents himself to be partner in a business. Brugman *v.* McGuire, 32 Ark. 733; Dailey *v.* Coons, 64 Ind. 545; Dodd *v.* Bishop, 30 La. Ann. 1178; Baldey *v.* Brackenridge, 39 La. Ann. 660, 2 So. 410; Cirkel *v.* Croswell, 36 Minn. 323, 31 N. W. 513; Shafer *v.* Randolph, 99 Pa. 250; Walker *v.* Brown, 66 Tex. 556; Cornhauser *v.* Roberts, 75 Wis. 554, 44 N. W. 744.

It is equally applicable where one allows himself to be held out as partner by another; but his consent to the holding out must be proved. Humes *v.* O'Bryan, 74 Ala. 64; Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497; Kritzer *v.* Sweet, 57 Mich. 617, 24 N. W. 764; Seabury *v.* Bolles, 51 N. J. 103, 16 Atl. 54.

or responsibility, he must of course abide by the consequences of any contracts made on the faith of it. Most cases of this kind occur where a partner retires from a firm, and his retirement is unknown, either through his wish or his negligence. These we propose to consider together in reference to the duties and liabilities of a retiring partner.

It has been said, holding out one's self as partner *to the world* "is not a wise expression;" and the question should be, "whether he so held himself to the plaintiff, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner." (*y*) But to hold one's self out "to the world" means, precisely, so to hold one's self out as to justify anybody and everybody in believing him a partner; and it seems to be a very good expression for this purpose. It is a different case, when the plaintiff relies upon the fact that the party sought to be charged so held himself out specifically to the individual charging him.

[One who is held liable as a partner because he has been so held out is called a nominal or quasi partner.

This liability because of holding out rests upon the doctrine of estoppel, because the defendant, having represented himself to be a partner, cannot afterwards by showing the falsehood of the representations defraud those who have acted upon them. It does not make him an actual partner.[1] Therefore he is held liable only to one who knew of the holding out at the time he acted, and acted in reliance upon it.[2]]

(*y*) So said, by Parke, J., in Dickinson *v.* Valpy, 10 B. & C. 140.

[1] Grabenheimer *v.* Rindskoff, 64 Tex. 49.

[2] Vice *v.* Anson, 7 B. & C. 409; Dickinson *v.* Valpy, 10 B. & C. 128, 140; Carter *v.* Whalley, 1 B. & Ad. 11; Pott *v.* Eyton, 3 C. B. 32; Edmundson *v.* Thompson, 31 L. J. Ex. 207; Thompson *v.* First Nat. Bank of Toledo, 111 U. S. 529; Benedict *v.* Davis, 2 McLean, 347; *In re* Murray, 13 F. R. 550; Marble *v.* Lypes, 82 Ala. 322, 2 So. 701; Tanner & Delaney Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584; Levy *v.* Alexander, (Ala.) 10 So. 394; Alexander *v.* Handley, (Ala.) 11 So. 390; Bowie *v.* Maddox, 29 Ga. 285; Hefner *v.* Palmer, 67 Ill. 161; Brown *v.* Rains, 53 Ia. 81, 4 N. W. 867; Markham *v.* Jones, 7 B. Mon. 456; Wood *v.* Pennell, 51 Me. 52; Fitch *v.* Harrington, 13 Gray, 468; Partridge *v.* Kingman, 130 Mass. 476; Brown *v.* Grant, 39 Minn. 404, 40 N. W. 268; Rimel *v.* Hayes, 83 Mo. 200; Hahlo *v.* Mayer, 102 Mo. 93, 13 S. W. 804; Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588; Seabury *v.* Bolles, 51 N. J. 103, 16 Atl. 54; Burnett *v.* Snyder, 76 N. Y. 344, 81 N. Y. 550; Cook *v.* Penrhyn Slate Co., 36 Oh. St. 135; Denithorne *v.* Hook, 112 Pa. 240, 3 Atl. 777; Walker *v.* Brown, 66 Tex. 556, 1 S. W. 797. See also Buckingham *v.* Burgess, 3 McLean, 364, 549; Hicks *v.* Cram, 17 Vt. 449.

One or two cases *contra* cannot be considered as law. Young *v.* Axtell, 2 H. Bl. 242; Poillon *v.* Secor, 61 N. Y. 456.

So where one, who had held himself out as a partner, informed the agent of the

Much the greater number of cases relating to the liability of one held out as a partner turn upon the rights and duties of a retiring partner, and will be considered when treating of that subject.

§ 94. **What constitutes holding out.** — Persons may come under a general liability by merely having the same firm name, provided they do business in such a way as to lead to the inference suggested by the name, of an identity of interest. (*a*) So, too, if one is a partner in a house for some business, and the other partners carry on another business in which he has no interest, if nothing is done or said and no circumstances exist to indicate his want of community in this last business, so that those dealing with the other partners are justified in believing that they are dealing with him also, he is then liable as a partner. (*b*)

(*a*) James Spencer carried on business in Manchester under the firm of James Spencer & Co.; and William Spencer, in London, under the style of Spencer & Co. It was held, that William Spencer, having been in the habit, personally, or by his clerk, of accepting bills drawn upon James Spencer & Co., and addressed to William Spencer's place of business in London, had thereby held himself out as a partner of James, and became liable accordingly. Spencer *v.* Billing, 3 Camp. 310. And two firms will be held to be one, if they assume to constitute one. Beall *v.* Lowndes, 4 S. C. 258.

(*b*) Wood & Payne were in partnership as wholesale grocers. Wood, Payne, & Steele were partners in buying and selling cotton; this last business being carried on at Wood & Payne's counting-house, and in

plaintiff at the time of making the contract on which suit was brought that he was not a partner, he could not be held as partner. Willis *v.* Rector, 50 F. R. 684. And so where the plaintiff from any cause had notice. Alabama Fertilizer Co. *v.* Reynolds, 85 Ala. 19, 4 So. 639. See Alderson *v.* Pope, 1 Camp. 404 *n.*; Entwisle *v.* Mulligan, (Pa.) 12 Atl. 766 (*semble*).

Where the representation was not that the party was, but that he was about to become, a partner, he cannot be held as a nominal partner, since an estoppel cannot be founded upon a representation as to the future. Bourne *v.* Freeth, 9 B. & C. 632; Reynell *v.* Lewis, 15 M. & W. 517. And so a representation after the contract is made will not make one a nominal partner. Ridgway *v.* Philip, 1 C. M. & R. 415.

If the plaintiff, at the time of dealing with a firm, had been led by the defendant to believe the latter a partner, and therefore dealt with the firm believing defendant to be bound, the defendant is liable, although no special reliance was placed on his credit. Strecker *v.* Conn, 90 Ind. 469; Lieb *v.* Craddock, 87 Ky. 525, 9 S. W. 838.

It has been held in North Dakota that if the holding out as partner continues for a long time, the plaintiff need not show that he relied upon the representation; for such reliance will be presumed. Braithwaite *v.* Power, 1 N. D. 455, 48 N. W. 354. And in Rizer *v.* James, 26 Kas. 221, it was held that even in the absence of evidence that the plaintiff was misled by the holding out, the reputed partner would be liable as nominal partner.

A plaintiff may prove that the defendant was held out as partner with his own consent by showing such holdings out, though they did not come to the plaintiff's knowledge; and may then show that he relied upon the defendant's partnership by showing a holding out to him, though not by consent of the defendant. Fletcher *v* Pullen, 70 Md. 205, 16 Atl. 887.

The rule, then, is that every one who authorizes another to believe him a partner, is, as to the person so authorized, a partner: but it must also be true that this authorization must be such as would be so regarded by a reasonable and fair man; and a mere conjecture that a man is a partner, even from circumstances tending that way, is not sufficient to hold him as such. (*e*)

Usually, the question whether one is liable as a partner because so held out by himself, or with his consent, turns upon the force and meaning of his acts. If his name is advertised, (*q*) or is on

the name of Wood & Payne. Steele, however, had no concern in the grocery business, nor did he take an active part in the cotton business; nor was he known as a partner therein, either to the plaintiffs or to the world. Wood & Payne bought groceries of the plaintiffs; for which they gave a bill of exchange received by Wood & Payne, as cotton dealers, for cotton sold to the drawer, and in which Steele was interested. This bill was payable to the defendants or order, and was indorsed by either Wood or Payne, by the name of the firm of Wood & Payne. It was held that Steele was liable as partner on such indorsement. Swan *v.* Steele, 7 East, 210. See Miner *v.* Downer, 19 Vt. 14. Assumpsit on a bill of exchange by the indorsees against the defendant as one of the drawers, the other drawer having become bankrupt. The bill was drawn in the name of "James King & Co.," under which firm the defendant and his partners had traded. It also appeared that there were other partnerships carried on under the firm of "James King & Co.," in which the other drawers were concerned, but in which the defendant had no share. The defendant offered to show that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it. Lord Kenyon was of opinion that the defendant was nevertheless liable; he had traded with the other partners under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment. Baker *v.* Charlton, Peake, 80. See Fleming *v.* McNair, cited in 1 Montagu on Part. 37, note (*c*); and in 3 Dow, 229. In Baker *v.* Nappier, 19 Ga. 520, it appeared that Kilgrow & Price were in partnership in the hotel business, and Kilgrow & Patillo in the grocery business. From the evidence, also, it was doubtful whether each firm did not sometimes use or recognize the name of E. W. Kilgrow & Co. as its own. For goods bought of Kilgrow, in the name E. W. Kilgrow & Co., the plaintiffs sought to hold the firm of Kilgrow & Price. The court held, that the jury shonld be instructed, "that, if Baker & Hart (the plaintiffs), after taking reasonable care to find out which firm Kilgrow was dealing for, really thought he was dealing for that in which Mrs. Price was a member, and so sold him the goods, intending them for that firm, and if the goods were adapted to the business of that firm, — then that firm was liable to pay for the goods, although Kilgrow, in truth, intended them for the other firm, and although they went into the other firm."

(*e*) This is well illustrated by the language of the court in Baker *v.* Nappier, 19 Ga. 520, which has just been cited. In the course of its opinion in that case the court said: "A merchant, in dealing with a person known to him to be a member of two different firms, and in respect to goods suitable to either firm, would in general be in the exercise of no more than ordinary care, if he called on that person to know which was the firm he was dealing for. And if, without making any such inquiry, the merchant should sell the person the goods, thinking him to be acting for one firm when he was acting for the other, the merchant could, in general, hold only the firm for which the person was really acting, liable."

(*q*) In *Ex parte* Matthews, 3 Ves. & B. 125, the petitioner prayed that the joint commission against himself and John Matthews as partners might be superseded:

the painted signs over the door, (r) on the shop-bills or cards, (s) and he knows this and makes no objection, he is bound.

§ 95. **Consent must be Shown.** — But a person cannot be made liable as partner because so held out, unless the holding out is proved to have been with his concurrence. Hence the declaration or acts of A., implicating B. as his partner, while they bind the former, cannot affect the latter, without some confirmation by him. (t) As to public acts of this kind, there is some presump-

and stated that he, the petitioner, never was a partner, nor interested with John Matthews nominally or really in the property or profits of his trade, or any other trade; that he was merely the shopman to John Matthews, and not a trader; and that there was no pretence for supposing him a partner with John Matthews, except an advertisement in the "Gazette," declaring the partnership between them dissolved; which advertisement was inserted for the purpose of counteracting a report that they were partners. The Lord Chancellor held, that upon the affidavits he could not possibly decide that there was no partnership; and, accordingly, that an issue must be directed to try that question.

(r) Williams v. Keats, 2 Stark. 290; Dolman v. Prichard, 2 C. & P. 104.

(s) Young v. Axtell, 2 H. Bl. 242; Gill v. Kuhn, 6 S. & R. 338; Benedict v. Davis, 2 McLean, 348. See further, for illustrations of the methods by which persons may exhibit themselves as partners, *Ex parte* Langdale, 18 Ves. 300; s. c. 2 Rose, 444; Bond v. Pittard, 3 M. & W. 357; Guidon v. Robson, 2 Camp. 302; Geddes v. Wallace, 2 Bligh, 296; Stearns v. Haven, 14 Vt. 540; Hicks v. Cram, 17 Vt. 449; Cottrill v. Vanduzen, 22 Vt. 511; Matthews v. Felch, 25 Vt. 536; Perry v. Randolph, 6 Sm. & M. 335; Chapman v. Wilson, 1 Rob. (Va.) 267; Mershon v. Hobensack, 2 N. J. 372; Smith v. Smith, 27 N. H. 244; Holmes v. Porter, 39 Me. 157; Barnett v. Smith, 17 Ill. 565; McMullan v. Mackenzie, 2 Greene (Ia.), 368; Chidney v. Porter, 21 Pa. 390. If A., wishing to get bills discounted, introduces B., as his partner, to C., but the only connection between A. and B. is in discounting bills, B. is not hereby so held out as a general partner with A. as to be liable for goods afterwards bought by A. of a person who had been informed by C. that A. and B. were partners. Berkom v. Smith, 1 Esp. 29. See Ridgway v. Philip, 5 Tyrw. 131. A person is not liable as partner because so held out, who has signed his name to an instrument importing that the subscribers intend, upon the fulfilment of certain conditions, to carry on business in partnership. He has not thereby held himself out to the world as a partner in a company already formed. Bourne v. Freeth, 9 B. & C. 632. Nor is one who has retired from a firm, and given due notice thereof, liable as a partner to third persons for goods supplied to a ship, because, having before retirement defectively conveyed his interest as a partner therein, his name appears on the ship's register down to a period subsequent to the delivery of the goods, when he joins with the assignees of the other partners in making a good title thereto to their vendee. M'Iver v. Humble, 16 East, 169. See Hoare v. Dawes, 1 Doug. 371.

(t) Whitney v. Ferris, 10 Johns. 66; McPherson v. Rathbone, 7 Wend. 216; Jennings v. Estes, 16 Me. 323; Thornton v. Kerr, 6 Ala. 823; Tuttle v. Cooper, 5 Pick. 414; Anderson v. Levan, 1 W. & S. 334; Taylor v. Henderson, 17 S. & R. 453. See Matthews v. Felch, 25 Vt. 536; McBride v. Protection Ins. Co., 22 Conn. 248, 259. "The holding one's self out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership; and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, when a

tion that he knows and permits them; and he can escape the liability only by proving his want of knowledge and consent. (*u*)

If he knew, and neither consented nor refused, nor took any steps in relation to it, then he would be held as consenting; for he is in fault, and he should suffer rather than the wholly innocent persons whom he permits to be deceived. And if he does something in the way of objecting, the question then is, What and how much? (*v*) and we take the only rule to be, that if he is held out as partner, and knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled. If he does anything which might fairly produce the impression that he is a partner, or, when another does this, fails to do what he should to remove or prevent this impression, then he is as much liable as if he calls himself a partner.

§ 96. **Nominal Partner as Party in Suit.** — If one is chargeable as partner because so held out, he may be treated as one, not only by being made responsible, but by being joined with the partners in a suit against them. (*w*) Where there is a partner-

person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his consent thereto, is the very ground upon which he is estopped from disputing his liability as partner." Fox *v.* Clifton, 6 Bing. 776.

(*u*) See cases cited in preceding notes. [Where general reputation of a partnership was so widespread that it must have come to the knowledge of the parties affected, who did not deny it, this is a sufficient holdding out. Tanner & Delaney Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584.]

(*v*) As in the case of a retiring partner, who, it seems to be settled, must notify the dissolution to the public by proper advertisements, and, perhaps, to customers by a particular notice. Newsome *v.* Coles, 2 Camp. 617. See Leavitt *v.* Peck, 3 Conn. 124. See also *post*, § 315 *et seq.*

(*w*) That a nominal partner may be joined in a suit against the other partners is shown by almost every case in which this liability of a nominal partner is tested. See Goode *v.* Harrison, 5 B. & Ald. 156. That one held out as partner may be a co-plaintiff in a suit with the other partners, see Guidon *v.* Robson, 2 Camp. 302; Kell *v.* Nainby, 10 B. & C. 20. In Smith *v.* Sherwood, 10 Jur. 214, A. filed a bill for an account against B. & C., alleging himself a partner with them. B. & C., in their answer, denied the existence of the partnership, and stated that the plaintiff was their foreman, whom they had contemplated taking into partnership, and whom, therefore, they had allowed to hold himself out as their partner in many ways. They admitted that the accounts had been made out in the name of B., C., & A.; that, in a certain specification of buildings required by them, the buildings had been described as the property of B., C., & A.; and also that they had served A. with a notice to dissolve partnership. The Vice-Chancellor held, that there was sufficient proof of the existence of a partnership between B., C., & A. Such a partner may also be made a bankrupt as a member of the firm. *Re* Krueger, 2 Low. 66. [*In re* Rowland, L. R. 1 Ch. 421.]

ship as to third parties, the law presumes a partnership as between themselves. (*y*)

[And indeed it is usually impossible for the plaintiff to know, before bringing suit, that the nominal partner is not a true partner.

But since the nominal partner is not a partner in fact, nor interested in the property of the partnership, he should not be joined as plaintiff in an action on a simple contract of the firm. (*yy*) [1] But if the nominal partner is named as a party to a bill or note he must of course be joined in any action brought upon it; since an action on mercantile paper must be brought by or against the parties to it.[2]]

§ 97. **Firm Name.** — Every partnership should have its proper name or style. It may be whatever name the partnership chooses; (*ee*) and this name need not be prescribed in the articles, or determined upon by express agreement. It may grow out of the custom of the firm, and the manner in which it carries on its transactions. (*f*) If it have no name, and even if it avoid having

(*y*) Lord Ellenborough in Peacock *v.* Peacock, 2 Camp. 45.

(*yy*) A nominal partner need not join as a coplaintiff in an action on a conract made by the firm. *Ex parte* Alexander, 1 Glyn & J. 409; Atkinson *v.* Laing, 1 Dow. & R. 16; Bernard *v.* Wilcox, 2 Johns. Cas. 374. See Allen *v.* White, Minor, 365. On the other hand, the nominal partner may be a witness for the plaintiff, if he be clearly shown to have no interest whatever in the concern. Parsons *v.* Crosby, 5 Esp. 199; Davenport *v.* Rackstrow, 1 C. & P. 89; Kell *v.* Nainby, 10 B. & C. 20; Glossop *v.* Colman, 1 Stark. 25; Teed *v.* Elworthy, 14 East, 210.

(*ee*) Crawford *v.* Collins, 45 Barb. 269.

(*f*) In Le Roy *v.* Johnson, 2 Pet. 186, Hoffman & Johnson had entered into articles of copartnership, and one of the questions in the case was, what the firm-name

1 Kell *v.* Nainby, 10 B. & C. 20; Cox *v.* Hubbard, 4 C. B. 317; Spurr *v.* Cass, L. R. 5 Q. B. 656; Bishop *v.* Hall, 9 Gray, 430. See also Teed *v.* Elworthy, 14 East, 210; Parsons *v.* Crosby, 5 Esp. 199; Davenport *v.* Rackstrow, 1 C. & P. 89; Harrison *v.* Fitzhenry, 3 Esp. 238; Glossop *v.* Colman, 1 Stark. 25; *Ex parte* Watson, 19 Ves. 461; Kieran *v.* Sandars, 6 Ad. & El. 515; Allen *v.* White, Minor, 365.

2 Guidon *v.* Robson, 2 Camp. 302. In that case the action was brought by Guidon alone against Robson, upon a bill of exchange, drawn in the name of Guidon & Hughes upon Robson, and by him accepted. Hughes was simply a clerk of Guidon. Lord Ellenborough said: "There being such a person as Hughes, I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a partner as between himself and the rest of the world. Persons in trade had better be very cautious how they add a fictitious name to their firm, for the purpose of gaining credit. But where the name of a real person is inserted, with his own consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible, and the contract of one is the contract of all. In this case, the declaration states that the defendant promised to pay the money specified in the bill, to the plaintiff only, whereas she promised to pay it to the plaintiff jointly with another person. The variance is fatal."

one, the responsibilities of those who can be shown to be actually partners will not be prevented or lessened. (*g*) [Any name may be adopted as the firm name, even though of a form appropriate for a corporation.][1]

But, when there is an adopted and recognized style, nothing else, as such, binds the partnership.[2] But though a partnership style has been agreed on in the articles or otherwise, and has been used accordingly, proof that another name is also custom-

was. Washington, J., said: "It is quite clear that the name of this firm is nowhere designated in the articles of copartnership which have been referred to. The mode in which a particular branch of their business was to be conducted cannot reasonably be construed to give a name to the firm. It manifestly had no allusion to that subject. The stipulation that the funds necessary for the purposes of the concern should be raised upon the paper of Johnson, to be indorsed by Hoffman, or in such other shape as might be found most suitable to the object of the parties, no more designated Jacob Hoffman than it did George Johnson as the name of the copartnership. It is unnecessary to decide whether the omission to agree upon a partnership name in the body of the instrument was or was not supplied by the signatures of the contracting parties to it; because it was in full and uncontradicted proof that, after the concern went into operation under the articles, their books were kept, and the bills and accounts relating to their business were made out at their warehouse, in the joint names of Hoffman & Johnson, by which name the firm was generally known in Alexandria, and in which they acted in relation to the business of the concern, and advertised in the newspapers. Now, it cannot be questioned but that a name thus assumed, recognized, and publicly used, became the legitimate name and style of the firm, not less so than if it had been adopted by the articles of copartnership." W. G. & C. agreed to enter into partnership; but the articles were silent as to the name of the firm. C. bought merchandise on joint account, and executed a note therefor, signed in the name of himself & Co. It was held, that, in the silence of the articles on the subject, the fair presumption was that the style adopted by C. was that agreed upon by the parties as the name of the firm. Aspinwall *v.* Williams, 1 Ohio, 38; Drake *v.* Elwyn, 1 Caines, 184. In Ripley *v.* Colby, 23 N. H. 443, the court said: "Was the evidence competent to show that the plaintiffs constituted the firm of S. F. Ripley & Co. The evidence was direct that the plaintiffs agreed to hire a stable for their common use; that they afterwards occupied this stable according to this agreement; that they furnished money in the stipulated proportions to pay their hostler, and to pay the rent. They made these repairs on the building while they so occupied it. They entered and held under a lease made by the defendants to S. F. Ripley & Co. This must be held competent and quite satisfactory evidence that the plaintiffs were partners under the firm of S. F. Ripley & Co., and, as such, made the repairs in question."

(*g*) See Bank of Rochester *v.* Monteath, 1 Den. 402.

1 Carico *v.* Moore (Ind.), 29 N. E. 928; Holbrook *v.* Insurance Co., 25 Minn. 229.

2 Kirk *v.* Blurton, 9 M. & W. 284; Faith *v.* Richmond, 11 A. & E. 339; Norton *v.* Thatcher, 8 Neb. 186. See also Norton *v.* Seymour, 3 C. B. 792; Maclae *v.* Sutherland, 3 E. & B. 1; Drake *v.* Elwyn, 1 Caines, 184; Michael *v.* Workman, 5 W. Va. 391.

There is one exception to the general rule that a partner can bind his firm by the issue of commercial paper only when he makes use of the firm name. At common

arily employed in the dealings of the firm, with the concurrence of all the partners, or even of the managing partner alone, will suffice to make that name one by which the partnership will be bound. (*h*) [And a change in the name of a firm without any change in membership, does not change the partnership itself.][1] If the style be A., B., & Co., the Co. being C., a note signed A., B., & C., in which they jointly and severally promise to pay, is not a partnership note. (*i*) Neither would a note signed "A. & B." be the note of the firm. In either case, or almost any other, upon proof that the partnership was really the party in interest

(*h*) Williamson *v.* Johnson, 1 B. & C. 146. Abbott, C. J.: "It appears from the evidence that Hopgood, Dixon, and a person named Lye, carrying on business in partnership together, were known by the description of Hopgood & Co. All their transactions of buying and selling were carried on in that name; but Dixon, who was proved to be the manager of the whole business, was also in the habit of indorsing bills in the name of Hopgood & Fowler, by procuration, for the purpose of getting them discounted. The question then is, whether that sufficiently proves the existence of persons using, for the purposes of business, the style and firm of Hopgood & Fowler? At the trial I was at first inclined to yield to the objections but afterwards altered my opinion. I still think that, as between third persons, there was sufficient evidence of an indorsement, by persons using the style and firm of Hopgood & Fowler; inasmuch as Dixon, the managing partner in the firm of Hopgood & Co., was in the habit of issuing bills into the world, indorsed under the former designation." [Wright *v.* Hooker, 10 N. Y. 51; Moffat *v.* McKissick, 8 Baxt. 517.] See Faith *v.* Richmond, 11 A. & E. 339; Rogers *v.* Coit, 6 Hill, 322; Mifflin *v.* Smith, 17 S. & R. 165; Palmer *v.* Stephens, 1 Denio, 471; Tams *v.* Hetner, 9 Pa. 441; Le Roy *v.* Johnson, 2 Pet. 186.

(*i*) Perring *v.* Hone, 4 Bing. 32; Crouch *v.* Bowman, 3 Humph. 209. See Marshall *v.* Colman, 2 Jac. & W. 266; Kendrick *v.* Tarbell, 27 Vt. 512; *In re* Warren, 1 Ware (Daveis), 320; Filley *v.* Phelps, 18 Conn. 294. In Lord Galway *v.* Matthew & Smithson, 1 Camp. 403, where the action was against the defendants as surviving partners, Lord Ellenborough held, that a note made in the following manner was sufficient on the face of it to bind the whole firm: "Sixty days after date, I pay Lord Viscount Galway, or order, 200*l.* value received. For J. Matthew, T. Whitsmith, and T. Smithson, J. Matthew." But this must of course proceed on the presumption that the names of all the partners, as subscribed by the partner acting for the firm, were to be considered the style of the firm until the contrary was proved. Caldwell *v.* Sithens, 5 Blackf. 99. In Norton *v.* Seymour, 3 C. B. 792, the action was upon a note drawn in the following form: "Two months after date,

law a parol acceptance of a bill of exchange is good; therefore where a partner accepts a firm bill by signing his own name, this charges the firm, the true reason being that there is a valid parol acceptance. Mason *v.* Rumsey, 1 Camp. 384; Jenkins *v.* Morris, 16 M. & W. 877; Lindus *v.* Bradwell, 5 C. B. 583; May *v* Hewitt, 33 Ala. 161; Dougal *v.* Cowles, 5 Day, 511; Beach *v.* State Bank, 2 Ind. 488; Tolman *v.* Hanrahan, 44 Wis. 133. *Contra*, Taber *v.* Cannon, 8 Met. 456.

But where an acceptance is required by statute (e. g. 19 & 20 Vict. c. 57, § 6) to be signed by the party charged, the signature of one party does not bind the firm. Heenan *v.* Nash, 8 Minn. 407.

[1] Gill *v.* Ferris, 82 Mo. 156.

and under obligation, and that another style than that of the partnership was used through inadvertence or fraud, the partnership would be held liable; (*j*) but no signature other than their own would hold them as their signature. (*k*) [1]

we promise to pay," &c., and signed, "Thomas Seymour, Sarah Ayres," in the handwriting of Seymour. The defendant Ayres had formerly carried on business at the place at which the goods, in respect of which the above note had been given, had been supplied, and had admitted that she was in partnership with Seymour. A circular and invoice issued by Seymour were also in evidence; the circular stating that the business would in future be carried on in the names of Seymour & Ayres, and the invoice being headed Seymour & Ayres. It was objected, on the part of the defendant Ayres, that, assuming the existence of a partnership between herself and Seymour, the latter had no authority to bind her by a bill or note signed otherwise than with the name of the firm. On motion for a new trial of the case, Maule, J., said. "As to the form of the note, it is to be observed that it is signed by Seymour in the name of himself and the other member of the firm. Suppose there was no authority so to sign it, other than the general authority conferred by the partnership, I should hesitate to say that one of two partners could not bind the other by signing the true names of both, instead of the fictitious name. That, however, is not the question here. The circular states that the business will in future be carried on in the names of Seymour & Ayres; that is, in the names of the two persons mentioned, whatever those names may be. Thomas Seymour is the name of the one, and Sarah Ayres that of the other. There is, therefore, sufficient evidence of a special authority to sign the note in those names, if such special authority were necessary."

(*j*) Kinsman *v.* Dallam, 5 Monr. 382; Crozier *v.* Kirker, 4 Tex. 252. In Faith *v.* Richmond, 11 Ad. & Ell. 339, Richmond, Barbour, & Hannay were in partnership, under the style of "The Newcastle & Sunderland Wall's End Coal Company." A promissory note was made by Richmond, signed as follows: "For the Newcastle Coal Company, William Richmond, manager. At the London and Westminster Bank." It was objected that, admitting Richmond to be entitled, as a partner, to make promissory notes on behalf of The Newcastle & Sunderland Wall's End Coal Company, yet this was not a note drawn in their behalf, and could not bind them; "The Newcastle Coal Company" not being their firm, nor the London & Westminster Bank one with which they dealt. The Lord Chief Justice, in summing up, observed, that the three defendants were partners, and Richmond might draw bills or notes as their agent; and that if he had done so in the name of The Newcastle & Sunderland Wall's End Coal Company, or if the plaintiff had been used to deal with them as the Newcastle Coal Company, the defendants would have been bound; but he left it to the jury to say, whether, on the evidence, the note in question was one which Richmond, as a partner in the first-mentioned firm, had authority to draw. A verdict being found for the defendants, the Court of Queen's Bench refused a rule for a new trial, on the ground of misdirection.

(*k*) "If, in the body of a promissory note, made by one partner, the language be, 'I promise to pay,' &c., but the note be signed with the copartnership name, such note is binding on the firm, and not alone on the partner who executed it." Doty *v.* Bates, 11 Johns. 544. But if an obligation on its face purports to be the act of one partner, and to be made to secure a debt due from him individually, the mere fact that the partnership name is signed to this instrument is not sufficient to bind the firm thereby. Scott *v.* Dansley, 12 Ala. 714. If a note be made as follows: "I promise to pay," &c., and

[1] The same partners sometimes carry on business in different places at the same time; and it becomes a question whether there is more than one partnership. If the

§ 98. **Business done in Name of single Partner.** — Questions of this kind sometimes arise where partners in business do not advertise or in any public way make known the fact of partnership, but transact their business under the name of one of their partners only. (*l*) When parties agree to transact business jointly, or under an agreement to share in the profits, the name or firm which they use is arbitrary and conventional. They may use the name of both, or of one of them alone, or any distinct designation, by which all will be included and bound, as if their names were used. (*m*) But though the business of a copartnership may be transacted in the name of one partner, that partner alone cannot bring an action for the price of goods sold by the house. The other acting and ostensible partners must be co-plaintiffs. (*n*) And in assumpsit by a co-partnership, the plaintiffs must prove who compose the firm. (*nn*) These questions are much complicated when this partner does business on his own account also, for then the signature may do nothing toward determining whether

be signed "For A., B., C., & D., A." or "By A.," it seems that the whole firm is liable thereon. Galway *v.* Smith, 1 Camp. 403; Hall *v.* Smith, 1 B. & C. 407; *Ex parte* Buckley, 14 M. & W. 469. Whether upon such a note there is a separate right of action against the executing partner, see *post*.

(*l*) The style of a copartnership may be the name of one of its members, *Ex parte*, Bolitho, 1 Buck, 100; South Carolina Bank *v.* Case, 8 B. & C. 427; Palmer *v* Stephens, 1 Denio, 471; or of one who is not a partner, Bank of Rochester *v.* Monteath, 1 Denio, 402; Williamson *v.* Johnson, 1 B. & C. 146.

(*m*) Per Shaw, C. J., in Baring *v.* Crafts, 9 Met. 392. And where the name of one partner is the style of the firm, that partner's name, with the addition of "& Co." will not operate as the signature of the partnership. As where J. B. & C. H., carrying on business as partners under the name of J. B. & C. H., made and indorsed a bill of exchange in the name of "J. B. & Co.," it was held, that J. B. was not bound thereby. Kirk *v.* Blurton, 9 M. & W. 284. See Maclae *v.* Sutherland, 3 E. & B. 34, 35; Forbes *v.* Marshall, 11 Exch. 176, 180.

(*n*) Wilson *v.* Wallace, 8 S. & R. 53.

(*nn*) Patten *v.* Whitehead, 13 Rich. L. 150. See Pursley *v.* Ramsey, 31 Ga. 403; Tilford *v.* Ramsey, 37 Mo. 563.

same business is carried on simultaneously in several places under the same name, there is of course but one partnership. The fact that the name under which the business is carried on is varied would not of itself make a difference. Where the same business is carried on by the same parties there is ordinarily but one partnership, though the business is conducted under different firm names in the different places. Campbell *v.* Colorado Coal & Iron Co., 9 Col. 60, 10 Pac. 248. But where the same partners carry on different lines of business under different names, there are distinct partnerships. Second Nat. Bank *v.* Burt, 93 N. Y. 233. And where a firm is dissolved without assets, and the same partners afterwards unite to carry on again the same business, the firms are distinct. *In re* Nims, 16 Blatch. 439. In fact, it is a question neither of name, time, nor place; but of the intention of the parties to form or not to form a new association. Where A. & B. do business as A. & Co., and A. does business in another place under the same name, the creditors of A. in connection with the latter business are his separate creditors. Loeb *v.* Morton, 63 Miss. 280.

a purchase was made, or a bill accepted, or a note given by that individual alone, or by a partnership of which he was a member. All questions of this kind are questions of fact rather than of law. Nothing better can be said, perhaps, than that they must be answered accordingly as the evidence brings them under this or that general principle of the law of partnership. If, for example, the character of the goods purchased, the circumstances of the purchase, the use made of them, or the circumstances attending the giving of the paper, or any or all of these, sufficiently indicate that the transaction was in fact on account of the partnership, it will be held as the transaction of the partnership.[1]

[1] Where the name of one partner is used as the firm name it will be presumed that the name is used on behalf of the firm. "When a name is common to a firm and to an individual member of that firm, and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted, or indorsed in the common name is a bill drawn, accepted, or indorsed for the partnership, and for which the partnership is liable." Yorkshire Banking Co. *v.* Beatson, 5 C. P. D. 109, 116. See to the same effect South Carolina Bank *v.* Case, 8 B. & C. 427; Furze *v.* Sharwood, 2 Q. B. 388; Winship *v.* Bank of U. S., 5 Pet. 529; Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Bank of Rochester *v.* Monteath, 1 Den. 402; Ontario Bank *v.* Hennessey, 48 N. Y. 545; Oliphant *v.* Mathews, 16 Barb. 608; Graeff *v.* Hitchman, 5 Watts, 454; Mifflin *v.* Smith, 17 S. & R. 165. Where, however, the ostensible partner does other business on his own account, there is no presumption that the name is used as the firm name; and one attempting to charge the firm must show that it was so used as to bind the firm. U. S. Bank *v.* Binney, 5 Mason, 176; Buckner *v.* Lee, 8 Ga. 285; Mercantile Bank *v.* Cox, 38 Me. 500; Manuf. & Mech. Bank *v.* Winship, 5 Pick. 11; Etheridge *v.* Binney, 9 Pick. 272; Hastings Nat. Bank *v.* Hibbard, 48 Mich. 452, 12 N. W. 651; Fosdick *v.* Van Horn, 40 Oh. St. 459. See Beakes *v.* Da Cunha, 126 N. Y. 293, 27 N. E. 251. In that case, however, it is enough to show that the name was in fact used as the firm name, either by the circumstances at the time or by the statement at the time of the ostensible partner. *Ex parte* Bolitho, 1 Buck, 100; Trueman *v.* Loder, 11 A. & E. 589; Etheridge *v.* Binney, 9 Pick. 272; Gernon *v.* Hoyt, 90 N. Y. 631. Thus in United States Bank *v.* Binney, 5 Mason, 189, where the two Binneys and John Winship were in partnership, under the firm and style of "John Winship," and the action was against all the partners, as indorsers upon promissory notes indorsed in the name of John Winship, Story, J., said: "The notes are all indorsed in the name of 'John Winship.' For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs must, then, go farther and show, either expressly or by implication, that these notes were offered by Winship as notes binding the firm, and not merely himself personally, as that the discounts were made for the benefit and in the course of the business of the firm. It is not sufficient for the plaintiffs to prove that the bank, in discounting these notes, acted upon the *belief* that they bound the firm, and were for the benefit and business of the firm. They must go farther, and prove that that belief was known to and sanctioned by Winship himself in offering notes, and that he intentionally held out to them that the discounts were for the credit and on the account of the firm, and that his indorsement was the indorsement of the firm and to bind them; and that the bank discounted the notes upon the faith of such acts and representations of Winship. The jury will judge, from the whole evidence, how the case stands in these respects. The mere fact that the discounts so procured were applied to the use of the firm is not, of itself, sufficient to prove that the discounts were procured on account of the firm. It is a strong circumstance, entitled to weight, but not decisive."

In all such cases, it must be remembered that the individual partner whose name is used, has, by law, full authority to represent and act for the rest, and use his own name as the name of the firm; and his representations in a matter of business which might be theirs bind them all, however fraudulent on his part. If, therefore, when he purchases goods, or gives a note, or offers a note for discount with his indorsement, he represents that he acts for the partnership, and the person with whom he deals believes honestly and rationally that he does so act, the partnership, and of course all the partners, are bound, although no name but that of the individual was used in the transaction.

The use of such a name as usually indicates partnership, even though it may be *primâ facie* evidence of partnership, is slight and easily rebuttable.[1]

§ 99. **Ostensible Partners pass Property.** — [Where there is a secret partner, any dealing with the firm property by the ostensible partners would seem to bind the secret partners. So where one is an ostensible sole trader, a pledge of the property for his private debt is binding upon the secret partner.[2] So where the firm appears to consist of A. & B., who transfer firm property in payment of their joint debt, this gives the creditor a valid title as against a secret partner.[3] On the other hand, where a

[1] Charman *v.* Henshaw, 15 Gray, 293. The use of such a name gives rise to no presumption of partnership. Brennan *v.* Pardridge, 67 Mich. 449, 35 N. W. 85. Where a statute provides that action may be brought against a partnership where it does business, it has therefore been held that a sole trader who in doing business added "& Co." to his name could not be sued where he did business. Stirling *v.* Heintzman, 42 Mich. 449, 4 N. W. 165. The opposite conclusion was reached in Rosenbaum *v.* Hayden, 22 Neb. 744, 36 N. W. 147, on the ground of estoppel; but the defect being jurisdictional, it would seem that it could not be so cured.

[2] Raba *v.* Ryland, Gow, 132; Cammack *v.* Johnson, 1 Green Ch. 163; Motley *v.* Frank, 87 Va. 432, 13 S. E. 26. See Cochran *v.* Anderson Co. Bank, 83 Ky. 36.

[3] Tupper *v.* Haythorne, Gow, 135, *n.*; Reid *v.* Hollinshead, 4 B. & C. 867; Locke *v.* Lewis, 124 Mass. 1. See Edmunds *v.* Bushell, L. R. 1 Q. B. 97; Dean *v.* Plunkett, 136 Mass. 195. It has been said (*e. g.*, 2 Bates Part. 1046) that Locke *v.* Lewis is opposed to the doctrine stated above, that if an individual creditor of a partner takes firm property in payment of his private debt the creditor cannot hold it even if he was ignorant that the property was firm property. *Ante*, § 90, *n.* 1. That the case is not opposed to that doctrine will appear from an examination of the opinion. It was an action of replevin for three carriages. The plaintiff had been in partnership with I. L. and D. C. Robinson in the business of manufacturing carriages; but the firm was dissolved, and plaintiff conveyed his share of the business to the Robinsons, and received in return a note signed by them. He afterwards accepted from them, in payment of the note, the three carriages in question, for which they gave him a bill receipted in the name of the firm. Meanwhile, however, they had formed a special partnership with three others; but this new partnership was unknown to the plaintiff, and the business was continued as before. The new firm attached the carriages, and this action was brought against the attaching sheriff. In the course of the opinion, Gray, C. J.,

partner so deals with his property as to make it apparently partnership property, one who buys it from the other partner gets a valid title.[1]]

§ 100. **Liability for Tort of a Partner.** — Partners are liable *in solido* for the tort of one, if that tort were committed by him as a partner, and in the course of the business of the partnership. This principle is frequently illustrated by cases in which a partnership is held liable for injury caused to third persons by their having acted upon the false and deceitful representations made to them by one partner. (*b*)

(*b*) Patten *v.* Garney, 17 Mass. 182; Doremus *v.* McCormick, 7 Gill, 49; Locke *v.* Stearns, 1 Met. 560; National Exchange Co. *v.* Drew, 2 Macq. 103; Blair *v.* Bromley, 5 Hare, 542, 2 Phillips, 354. See Brydges *v.* Branfill, 12 Sim. 369; Coomer *v.* Bromley, 5 De G. & S. 532; Chester *v.* Dickerson, 51 Barb. 349. As where the plaintiffs were induced to take the note of a third party in payment for goods sold upon the representation of one of the defendants, who were partners, that it was good, when, in fact, the defendants knew the makers were insolvent, and the note worthless; it was held, that the defendants were liable, either in an action of assumpsit to recover the value of the goods sold, or in an action on the case to recover damages for the deceit practised. Hawkins *v.* Appleby, 2 Sandf. 421. In one case (Willett *v.* Chambers, Cowp. 814), particular circumstances were held to make a partner liable for a fraud committed by his copartner before the beginning of their partnership. The facts were these: Prior to any partnership between the defendant and Dudley, an attorney and conveyancer, the latter, in the year 1771, received of a Mr. Bindley the sum of 350*l.*, to be laid out on real security. Dudley accordingly furnished him with a mortgage from a Mr. Hughes to that amount, which, as it after-

said: "If the private creditor has no knowledge that the property belongs to the partnership, and the partnership has entrusted its property to one partner in such a manner as to enable him to deal with it as his own, and to induce the public to believe it to be his, then the other partners fall within the rule that when one of two innocent persons must suffer, that one must suffer who by his acts or conduct has afforded the means of committing the fraud. To hold a sale or a contract by the ostensible partners to be absolutely void, for abuse of authority by them, so as to confer no title and no rights upon a person dealing with them in good faith, within the apparent scope of their authority and right, with no knowledge of any abuse thereof, would be to apply to partners, having both title and authority ample for the purpose, a stricter and narrower rule than is applied to an ordinary agent exercising a bare authority without interest. . . . The case upon which the defendant principally relies is Rogers *v.* Batchelor, 12 Pet. 221. But nothing was adjudged in that case inconsistent with the views above stated. . . . We would not be understood to affirm that the mere belief of the separate creditor that the property which he receives does not belong to the partnership will of itself be sufficient to entitle him to hold it, if there has been nothing in the acts or conduct of the other partners to induce the belief that the partners with whom he dealt were the sole owners. Chazournes *v.* Edwards, 3 Pick. 11; Gordon *v.* Ellis, 2 C. B. 825, 829. . . . If the plaintiff, by the manner in which the general partners dealt, and had been allowed by the special partners to deal, with the property sold to him, was induced to believe that it was the property of the general partners only, and, acting on such belief, bought it in good faith, and with no notice or knowledge that the special partners, or any other person than the general partners, had any interest therein, he was entitled to maintain this action."

[1] Birks *v.* French, 21 Kas. 238; Taylor *v.* Wilson, 58 N. H. 465 (*semble*).

§ 101. **Notice to one Partner.** — [Upon a similar principle, notice of a certain state of facts, if proved as to one partner in the course

ward appeared, Dudley had *forged*. In 1776, Dudley and Chambers entered into partnership, shortly after which Bindley wanted to call in his money. The pretended mortgagor was represented at the same time to want a further sum of 150*l*., which, added to the original mortgage-money, made together the sum of 500*l*. The plaintiff, Willett, was ready to advance this sum. And, in consideration of his doing so, an assignment was made to him of the false mortgage, before made to Bindley. As to 180*l*. *part* of this sum of 500*l*., Willett paid it into Dudley's office to Chambers; who gave for it his separate receipt, Dudley not being at home. He subsequently called at the office, and paid the residue to Dudley, who gave therefor his separate receipt. It was admitted that Chambers was in no respect privy to the forgery. Upon these facts, the jury having found for the plaintiff, the Court of King's Bench held, that the verdict should stand; Lord Mansfield saying: "The defendant suffers by the rascality of a man who had a very good character. I am very sorry for the defendant; but, upon this evidence, I cannot say but that it is a partnership transaction." See, in illustration of the general principle of the text, Brydges *v.* Branfill, 6 Jur. 310, s. c. 12 Sim. 369; M'Farland *v.* Crary, 8 Cow. 258; Lowell *v.* Hicks, 2 Younge & C. 481; Blight *v.* Tobin, 7 Monroe, 617; Hadfield *v.* Jameson, 2 Munf. 53; Simms *v.* Brutton, 5 Exch. 802; State *v.* Neal, 27 N. H. 131. In this last case it was held, that if one of two persons unlawfully sell spirituous liquors in pursuance of an agreement between them, and for their joint account and benefit, the other party may be liable in an indictment for the sale. State *v.* Bierman, 1 Strobh. 256. See Townsend *v.* Bogart, 11 Abb. Pr. 355 (doubted in Stewart *v.* Levy, 36 Cal. 159); Gray *v.* Cropper, 1 Allen, 337; Taylor *v.* Jones, 42 N. H. 25; McKnight *v.* Ratcliffe, 44 Pa. 156. "If one partner of a firm colludes with one of another firm, in a transaction connected with the partnership, the partners of the person so colluding are liable for damages to the injured firm, by reason of that partner's misconduct." Per Lord Tenterden in Longman *v.* Pole, 1 Dawson & Lloyd, 126, 1 Mood. & Malk. 223. In that case, the facts were as follows: The plaintiffs, Longman & Co., bankers, with the defendants, Pole & Co., and Hunt, a partner in the house of Longman & Co., sent the cashier to the defendants with cash to take up bills accepted by him in the name of the firm and coming due the next-day. He accordingly took up the bills, but by Hunt's order did not enter them in the plaintiff's books. About the same time, Downes, a partner in Pole & Co., told one of the defendants' clerks that a bill of Longman's would come in on such a day, which he was to pay and give to him (Downes), debiting Hunt with it in the note-book, so that it might not go into the ledger. Downes afterwards gave similar directions respecting another bill. Both these bills, which were acceptances by Hunt in the name of the firm, were paid and entered in the note-book to the debit of Hunt individually; and the cash payments made by Hunt to provide for these bills were also entered in the same book to his credit, so that no trace of these proceedings appeared in the pass-book of the defendants or the check-book of the plaintiffs. The cashier who gave the above statement also admitted that there were bills on Hunt's private account to a large amount, which appeared in the pass-book (which the plaintiffs were not in the habit of examining), but not in their check-book. It also appeared, that, at the time of these transactions, Hunt had a large private account with the defendant. Upon this state of facts, Lord Tenterden held the action as brought clearly maintainable. But the jury found a verdict for the defendants, the collusion of Downes not being established with sufficient certainty. The rule respecting the liability of partners for each other's torts is, as we have seen, confined to such torts as a partner commits in that character, and in the course of the partnership business. Hence, where three partners were sued in an action of trespass, on account of the wrongful ejectment by one partner of

of the business, will charge all.[1] Thus in an action upon a promissory note, the firm in order to show *bona fides* must show it as to each partner;[2] and where a firm takes a conveyance or mortgage of land, notice to one partner of a defect in the title is notice to the firm.[3] So notice of dishonor of commercial paper to one partner is notice to the firm.[4]

Notice to a partner before he entered into the partnership is clearly not chargeable to the firm, unless there is some connection between the notice and the final transaction.[5] And it has even been held that notice to one partner prior to the dealings by the firm, where the business was done entirely by the other partner, is not notice to the firm.[6] It would seem clear, at any rate, that

the tenant of a house, it was ruled that one partner could not involve his copartners in such a wrong; though there might be exceptions to the rule, as where the trespass was in the nature of a taking which was available to the partnership, and they afterwards concurred in it and received the benefit of it; or where, before the trespass, they all joined in ordering it. Petrie *v.* Lamont, 1 Car. & M. 93. So an innocent partner is not liable for a deceit practised by one of the partners upon a third person, by the sale to him of such partner's interest in the firm. Schwabacker *v.* Riddle, 84 Ill. 517. [Therefore where the guilty partner took a note from the purchaser for the purchase-money, and transferred it for value to an innocent partner, the latter can enforce payment of the note. Liddell *v.* Crain, 53 Tex. 549.] Mere subsequent approval of a partner's tort, not done in the interests of the partnership, will not render the partnership liable. Wilson *v.* Turnman, 6 M. & G. 236; Grund *v.* Van Vlack, 69 Ill. 478. In Pierce *v.* Jackson, 6 Mass. 245, Parsons, C. J., says: "A fraud committed by one of the partners shall not charge the partnership." And in Sherwood *v.* Marwick, 5 Me. 295, it seems to have been held, that one partner cannot be made liable for the fraud of another, without proof of actual participation. But in Locke *v.* Stearns, 1 Met. 564, where all the partners were held liable for the deceit of one, Shaw, C. J., cites and explains both the above cases. He considers them to have been decided on their special facts, and to be not inconsistent with the general principle of law under discussion. See Atkinson *v.* Mackreth, L. R. 2 Eq. 570, and Linton *v.* Hurley, 14 Gray, 191.

[1] Steele *v.* Stuart, L. R. 2 Eq. 84; *In re* Worcester Corn Exchange Co., 3 De G. M. & G. 180; Merchants' Bank *v.* Rudolf, 5 Neb. 527; State *v.* Linaweaver, 3 Head, 51. So where action is brought for injury caused by the falling of a gate belonging to the partnership, knowledge of its dangerous condition brought home to one partner, charges the firm. Newall *v.* Bartlett, 114 N.Y. 399, 21 N. E. 990. So where a statute allowed double damages in case timber was *knowingly* cut on the land of a third person, knowledge of one member of a firm responsible for the wrongful cutting of timber makes all the firm liable to the statutory damages. Tucker *v.* Cole, 54 Wis. 539, 11 N. W. 703.

[2] Frank *v.* Blake, 58 Ia. 750, 13 N. W. 50; Smith *v.* Hall, 5 Bosw. 319.

[3] Overall *v.* Taylor, (Ala.) 11 So. 738; Watson *v.* Wells, 5 Conn. 468; Sanders *v.* Ruddle, 2 T. B. Mon. 139. So of a lack of authority to convey personal property. Gray *v.* Church, 84 Ga. 125, 10 S. E. 539; Ruckman *v.* Decker, 23 N. J. Eq. 283; Williams *v.* Roberts, 6 Cold. 493. But see Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787, where the point was not taken.

[4] See *post* § 146.

[5] Williamson *v.* Barbour, 9 Ch. D. 529 (*semble*).

[6] Baldwin *v.* Leonard, 39 Vt. 260.

notice to a mere stockholder in a joint-stock bank would not be notice to the bank so as to affect a transaction conducted for the bank entirely by the directors. And such is the rule in England.[1] It is otherwise held in Pennsylvania.[2]]

§ 102. **Malice or Fraud of one Partner.** — [The same principle applies when a specific state of mind is required for an action of tort. Thus where a writing published by a firm is privileged unless there was malice, the malice of one partner renders all the partners liable,[3] and where a firm had obtained a discharge in bankruptcy, the whole firm is liable for a debt fraudulently contracted before bankruptcy by one partner.[4] But the innocent partner cannot be declared guilty of actual fraud.[5] One partner may be subjected to exemplary damages because of the fraud of his copartner.[6]]

It is not always easy to draw the line between such cases and those in which the partners are not liable. The fact that money procured by a fraud becomes partnership stock does not render them liable without their participation in or consent to the fraud. At the same time, if money be raised in the course of partnership business, by the fraud of one of the partners, the other partners will not be relieved from their liability for the fraud, merely by the want of evidence that the money so raised was applied to the use or benefit of the firm. (*c*)

(*c*) Compare Manuf. & Mech. Bank *v.* Gore & Grafton, 15 Mass. 75, with Boardman *v.* Gore, 15 Mass. 331. The firm is liable for frauds or torts practised by one of the partners in the partnership business, though the act was unknown to the other partners. Chester *v.* Dickerson, 52 Barb. 349; Stewart *v* Levy, 36 Cal. 159; Wolf *v.* Mills, 56 Ill. 360; Chambers *v.* Clearwater, 1 Abb. App. 341; Jackson *v.* Todd, 56 Ind. 406, 75 Ind. 472. But, in an action to recover damages for the deceit, the injured party, not knowing the other parties, need not join them. Leslie *v.* Wiley, 47 N. Y. 649. See also Dart *v.* Walker, 3 Daly, 136. The firm is not liable for a tort by one partner, when the act is known, by the party injured, to be in violation of law. Leslie *v.* Wiley, 47 N. Y. 649. See also Dart *v.* Walker, 3 Daly, 136.

1 See Richmond Ry. & Electric Co. *v.* Dick, 52 F. R. 379; Powles *v.* Page, 3 C. B. 16.

2 McClurkan *v.* Byers, 74 Pa. 405.

3 Lothrop *v.* Adams, 133 Mass. 471.

4 Cooper *v.* Prichard, 11 Q. B. D. 351 (C. A.) So each member of a firm is civilly liable for a violation of the revenue laws by a copartner, whether with or without the knowledge of the others United States *v.* Thomasson, 4 Biss. 99.

5 Stewart *v.* Levy, 36 Cal. 159. Therefore when one partner has obtained credit for goods sold the firm by false representations, the innocent partner cannot be arrested on civil process, under a statute authorizing arrest in case of fraud only. McNeely *v.* Haynes, 76 N. C. 122. And one partner cannot be punished under a statute punishing fraudulent debtors, because of fraudulent concealment by his copartner. Watson *v.* Hinchman, 42 Mich. 27, 3 N. W. 236.

6 Robinson *v.* Goings, 63 Miss. 500; Peckham Iron Co. *v.* Harper, 41 Oh. St. 100.

§ 103. **Wrongful dealing with Money.**— If a partner steals money, and deposits it to partnership account, innocent partners would not be liable for the tort, although assumpsit for money had and received might lie. (*d*)

(*d*) Rapp *v.* Latham, 2 B. & Ald. 795. Latham & Parry were in partnership as wine merchants. Parry, being the managing partner, in January, 1812, wrote to the plaintiff that he had an opportunity of purchasing sixty-one pipes of port, at 65*l.* per pipe, and he desired the plaintiff to remit the money to pay the price of such wine and the duties thereon. The plaintiff accordingly remitted the money, and Parry represented that he made the purchase, and afterward, in the name of the firm, transmitted an account to the plaintiff, stating that thirty of these sixty-one pipes have been resold at the price of 84*l.* per pipe, and paid the proceeds of such pretended sale to the plaintiff. Other similar transactions took place, running through a period of about one year. Each transaction formed the subject of a separate account, and all the purchases were described as being made at a certain specified rate per pipe. The plaintiff conceived that Parry was in fact laying out his money in *bona fide* purchases of wine, and that he actually resold part of such wine as he represented. But, the defendants failing, it appeared that the transactions were wholly fictitious, though the defendant, Latham, did not know that they were so. Upon the whole account, the plaintiff had received from the supposed resales more money than he had advanced; but he contended that he had a right to take each transaction separately, and to charge the defendants with the amount of the money advanced to them for the purchase of every pipe of wine not accounted for. It was held, that the plaintiff had such right; that Latham could not say that those transactions were fictitious which Parry had represented to be real; and that, beside retaining all the money that had been paid to him on account of those fictitious transactions, the plaintiff was also entitled to recover back the sums advanced for the other supposed purchases, as money advanced by him upon a consideration not performed, and as, therefore, had and received by the defendant to his use. In Kilby *v.* Wilson, Ryan & M. 178, it was held, that no property could be vested in a partnership by the fraud of one partner to which the rest were not privy. There the action was trover for divers bales of cotton, under the following circumstances: The plaintiffs, who were brokers, being employed by T. & Co to purchase cotton, bought it of R., for the use of T. & Co. The plaintiffs paid R. for the goods, delivered East India Company warrants for them to T. & Co., and received, in return, their check for the cost of the cotton and the charges. T. immediately pledged the warrants to the defendant, to cover his acceptances for two bills given to T. & Co. But the check taken by the plaintiffs for the cotton was dishonored; it afterwards appearing that the only object of T., in the transaction, was to raise money, and abscond which he accordingly did on the same day that he received and pledged the warrants. Payne, T.'s partner, who drew the check, was altogether unconcerned in the frauds of the latter. The defendant's acceptances were subsequently recovered from T., and were delivered to the defendant by the assignees of T. & Co., which firm had been declared bankrupt. Abbott, Ld. C. J., left it to the jury to say whether or not T. obtained the goods from the plaintiffs with a preconceived design to raise money upon them and then abscond, without ever paying the plaintiffs; if he did, they should find for the plaintiffs; otherwise, if T. conceived the plan of defrauding the plaintiffs after he had obtained possession of the cotton. See Snaith *v.* Burridge, 4 Taunt. 684. See cases cited in last note. Where one member of a firm uses trust funds in speculation in stocks, contrary to the copartnership article, and without the knowledge of the other, the latter is not liable. Guilliou *v.* Peterson, 9 Phila. 225. If a partner, who has knowingly received stolen goods, after discovery pays for them out of the

But if it was the business of a firm to receive property on deposit and for safe-keeping, and one of the partners stole and sold something so deposited, and spent the money, the partnership would be liable. This rule, or rather the principle on which it rests, has been applied to trustees, one of whom forged the names of his cotrustees, to a power authorizing his copartners to sell. (*e*)[1]

funds of the firm, to avoid prosecution, the money so paid cannot be recovered back in a suit in the name of the firm, even if the other partner is innocent, and the goods did not go to the use of the firm. Johnson *v.* Byerly, 3 Head, 194.

(*e*) Stone *v.* Marsh, 6 B. & C. 551. The plaintiffs, Fauntleroy and others, held stock as trustees; and the defendants, of whom Fauntleroy was also one, were in partnership as bankers. Fauntleroy executed a letter of attorney, authorizing his copartners to sell the said stock, and forged thereto the names of his cotrustees. The stock was accordingly sold and transferred by the partners of Fauntleroy to the credit of the purchasers in the books of the Bank of England. The consideration-money thereof was paid into the bank of the defendants' agents, to the credit of the defendants, according to the usual practice on the sale of stock for the defendants. Fauntleroy was permitted by his partners to conduct the greater part of the business of the house without their interference, and drew upon the account at Martin, Stone, & Co.'s, in the partnership name (as he thought fit), without the knowledge, and in fraud of his partners, more than the amount of the said sums so paid in. The defendants became bankrupt. Fauntleroy was tried for forging a similar instrument, convicted, and executed. The plaintiffs then presented a petition in bankruptcy, to be allowed to prove the amount of stock sold, against the joint estate of the bankrupts. Thereupon the Lord Chancellor directed an issue to try whether the defendants and Fauntleroy were, at the date, &c., indebted to the plaintiffs and Fauntleroy in any and what sum of money, it being also ordered that no objection should be taken on the ground that Fauntleroy was interested as a trustee jointly with the plaintiffs, and also as a partner with the defendants. *Ex parte* Bolland, Mont. & M. 315; Stone *v.* Marsh, Ryan & M. 364. The Court of King's Bench held, that the money received by the banking-house of the defendants constituted a debt due from them to the trustees. Lord Tenterden: "Upon this state of facts, it cannot be doubted that it was the duty of the house to place the money to the credit of the trustees, and retain it for their use, and subject to their order; and that no ignorance on the part of any of them, even supposing all but one to have been ignorant of the facts (which, however, cannot have been), nor any neglect on the part of the house, arising from a misplaced confidence reposed by them in one of themselves, or otherwise, to which the plaintiffs were no

[1] If it is part of the business of the firm to receive deposits, or if all the partners have knowledge of a deposit, the firm is liable where one partner receives a deposit on the firm account, and afterwards converts it or applies it to the general purposes of the firm. Cleather *v.* Twisden, 28 Ch. D. 340 (C. A.); Moore *v.* Knight, [1891] 1 Ch. 547; *In re* Ketchum, 1 F. R. 815. So where a firm of solicitors took money to invest, and one partner without the knowledge of the others invested it in an inadequate mortgage, all the partners were liable for the misapplication. Blyth *v.* Fladgate [1891], 1 Ch. 337. Where one of a firm of attorneys collected money for a client and misused it the other partners were held liable. Porter *v.* Vance, 14 Lea, 629. And where goods were intrusted to one partner to sell on commission, such being the business of the partnership, and the partner misapplied the proceeds, all the partners were liable. Todd *v.* Jackson, 75 Ind. 272. Where one of a firm of attorneys who had negotiated a mortgage took money to use in insuring the property, but failed to do so, the firm was liable by reason of the failure. Collier *v.* McCall, 84 Ala. 190, 4 So. 367.

§ 104. **Breach of Trust of Partner.**—If one of a firm, being also a trustee, applies the trust funds to the use of the partner-

parties, can deprive the plaintiffs of their right to their money." The plaintiffs were accordingly admitted to prove. For the defendants, it was argued at the trial at *nisi prius* (Ryan & M. 368). First, that no debt could be founded on and arise out of a felony; and that it was against the policy of the criminal law that the party whose name had been forged should be allowed to adopt the felony, or in any way to sanction it, or turn it to his advantage. Second, that, inasmuch as the transfer under a forged power worked no alteration of property, the plaintiffs had not lost their property, but still remained owners of the stock, and might call upon the Bank of England to account for both the principal and dividends. Third, that even if the defendants were fixed by the payment of the money to their agents, Martin & Co., still they were discharged by the repayment of it to Fauntleroy, one of the parties whose property it was, and into whose hands and use it appeared by the evidence to have come. In answer to the first objection, it was held, in the Court of King's Bench (6 B. & C. 564), and by Lord Lyndhurst (Mont. & Mac. 397), that it was undoubtedly a principle of law that a man should not be allowed to make a felony the foundation of a civil action. But that this rule of law was one founded on public policy, which requires that offenders against the law shall be brought to justice, and ceases to operate when the reason for it fails; and that no such policy or rule was applicable to the present case, the offender having already suffered the extreme penalty of the law for a similar offence. Further, that the assertion that the plaintiffs were seeking to ratify a felonious act, and were making that act the ground of their demand, was incorrect. That the ground of their demand was the actual receipt of the money produced by the sale and transfer of their annuities. That the sale was not a felonious act, nor the transfer, nor the receipt of the money. That the felonious act was antecedent to all these, and complete without them (see a similar opinion of the court in Boardman *v.* Gore, 15 Mass. 331). In reply to the second objection, it was held, in the same courts, that whether or not the plaintiffs had a remedy against the Bank of England, it was unnecessary to decide, since their remedy against the defendants was clear, and, generally speaking, when an injured party has different remedies against different persons, he may elect which he will pursue. Upon the third objection, Lord Tenterden said, in Ryan & M. 369: "But they say, also, that Fauntleroy was one of the persons entitled, and that he has drawn the money out, and, therefore, they are not answerable. Now, if two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw. If it is meant that the money should be paid to one, an authority to that effect ought to be given to the bankers; that, in my experience, has been the ordinary practice. If you are of opinion that this is the usual mode of dealing, then, as against the other two, it is no defence that the payment has been made to one only of several who are jointly entitled to receive it." See, to the same point, *Ex parte* Bolland, 1 Mont. & A. 570; Keating *v.* Marsh, 1 Mont. & A. 582; Marsh *v.* Keating, 1 Mont. & A. 592; S. C. 2 Cl. & Fin. 250. In Hume *v.* Bolland, 1 C. & M. 130, S. C. 2 Tyr. 575, a case arising out of the same bankruptcy, Marsh & Co., the banking firm of which Fauntleroy was a member, had been employed by the trustees of stock, standing in their names on the books of the Bank of England, to receive the dividends thereon. In the books of Marsh & Co., accordingly, the amount of the dividends was regularly carried to the credit of their employers, and was by them drawn for and received. But it afterwards appeared that none of the above dividends had in point of fact been received by Marsh & Co.; Fauntleroy having transferred and sold the stock by means of forged powers of attorney, and having caused the above entries to be made in the books of the firm in fraud of his copartners, the money never having been received by them. Upon the issuing of commissions against

ship, with the knowledge of the other partners, the firm will be chargeable with the amount, and held as debtors to the trust therefor. (*y*) It is said in some cases that the firm will not be liable in such case, unless the other partners have knowledge of the trust and of this application of the trust funds. (*z*) But it has also been held, that if a member of a firm, holding funds as an agent of a third party, puts that money into the business of the firm, the firm is liable whether the other partners knew that the money was so held or not. (*zz*) How far the knowledge and consent of the other partners is necessary to make them liable is not distinctly settled on the authorities.

[The true principle seems to be recognized in the case of Guillou *v.* Peterson.[1] There a partner lent to his firm securities which he held in trust, and the firm used them. It was held that

Marsh & Co., a case being sent to the Exchequer to try the question whether the bankrupts were indebted to the trustees, and if so in how much, it was held, that, at the date of the commissions, the bankrupts were not indebted to the trustees for the balance of the dividends appearing by the books to have been received. But see Hume *v.* Bolland, Ryan & M. 371; also Keating *v.* Marsh, *supra*, subsequently decided in the House of Lords, in Sadler *v.* Lee, 6 Beav. 324.

(*y*) *Ex parte* Watson, 2 Ves. & B. 414; Smith *v.* Jameson, 6 T. R. 601 ; Boardman *v.* Mosman, 1 Bro. C. C. 68 ; Jaques *v.* Marquand, 6 Cow. 497 ; Hutchinson *v.* Smith, 7 Paige, 26 ; Richardson *v.* French, 4 Met. 577. [*In re* Jordan, 2 F. R. 319 ; Rau *v.* Small, 144 Pa. 304, 22 Atl. 740.]

(*z*) *Ex parte* Heaton, Buck, 386 ; *Ex parte* Apsey, 3 Bro. C. C. 265 ; Guillou *v.* Peterson, 9 Phila. 225 ; Dounce *v.* Parsons, 45 N. Y. 180. But see Richardson *v.* French, 4 Met. 577 ; Whitaker *v.* Brown, 16 Wend. 509 ; Freeman *v.* Fairlie, 3 Meri. 44. In this last case, it seems to be held, that, if the other partners merely permit one partner to mix his accounts as executor with those of the firm, the partners may, without proof of further knowledge on their part, be compelled to produce those accounts to the *cestui que trust*. And, in the following case, the fact, that, during the continuation in a firm of trust funds by a breach of trust on the part of some of the partners, other partners entered and retired from the firm, seems to have exempted the latter from liability for the breach of trust of their copartners to which they were privy. A., a partner in a house of agency in India, died, having by his will directed his estate to be called in, and invested on certain trusts, and appointed two of his copartners his executors. They, however, suffered his share in the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners, and they knew that A.'s share was remaining in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed. It was held, that B. and C. were not responsible for the breach of trust committed by their copartners, the executors. Twyford *v.* Trail, 7 Sim. 92. Where trust money is put into trade without authority, the *cestui que trust* may generally elect to take from the trustees either a share of the profits, for the period of the breach, or interest for that time. There may, however, be circumstances in which the *cestui que trust* will have a right to divide the period, and to claim interest for one part and a share of the profits for another. Heathcote *v.* Hulme, 1 Jac. & W. 722 ; Docker *v.* Somes, 2 Mylne & K. 656. See Clayton's Case, 1 Meri. 572 ; Hankey *v.* Garrett, 1 Ves. 236.

(*zz*) Floyd *v.* Wallace, 31 Ga. 688 ; [Cunningham *v.* Woodbridge, 76 Ga. 302.] And see Harper *v.* Lamping, 33 Cal. 641.

1 89 Pa. 163.

all the partners were liable for the value of the securities, even if they had no knowledge of the trust. It was admitted that where a partner lent money to the firm, the innocent partners were not liable to the true owner, if the partner had misappropriated it; but in this case the securities had been used by the firm after it had received them, and this use gave *cestui que trust* a claim against the firm.]

§ 105. **Instances of Tort of Partner.** — A partnership to whom goods were consigned for sale was held liable for the pledge thereof by a fraudulent partner; (*a*) so was a firm of common carriers, one of whom lost property intrusted to them; (*b*) and partners in a publishing house, one of whom published a libel; (*c*) and partners in the stage-coach business, one of whom caused an injury by negligent driving. (*d*)

So all the partners are liable for the tort of an agent, although that agent were appointed by one partner only, provided he had authority to make the appointment. (*e*) So it would be in case of a breach of the revenue laws. (*f*) And a demand upon and a refusal by one partner is a conversion by the firm, which will sustain trover. (*g*) [1]

(*a*) Nicoll *v.* Glennie, 1 M. & S. 588.

(*b*) Mitchell *v.* Tarbutt, 5 T. R. 649.

(*c*) Rex *v.* Almon, 5 Burr. 2686; Rex *v.* Pearce, Peake, 75; Rex *v.* Topham, 4 T. R. 126; Rex *v.* Marsh, 2 B. & C. 723; [Atlantic Glass Co. *v.* Paulk, 83 Ala. 404, 3 So. 800.]

(*d*) Moreton *v.* Hardern, 4 B. & C. 223.

(*e*) As where several persons are proprietors of, and partners in, a line of stage coaches, but each stocks, and employs drivers for his own particular portion of the road; all the partners are liable for injuries caused by the misconduct and negligence of a person employed on any portion of the line, though such wrongdoer is hired and paid by only one partner. Weylan *v.* Elkins, Holt, N. P. 227; 1 Stark. 272; Bostwick *v.* Champion, 11 Wend. 571, 18 Wend. 175; Bayley, J., in Laugher *v.* Pointer, 5 B. & C. 570. See also Dwight *v.* Brewster, 1 Pick. 50; Cobb *v.* Abbott, 14 Pick. 289; Stockton *v.* Frey, 4 Gill, 406; Hadfield *v.* Jameson, 2 Munf. 53; Locke *v.* Stearns, 1 Met. 560; Roberts *v.* Totten, 8 Ark. 609; National Exch. Co. *v.* Drew, 2 Macq. 103; Cotton *v.* Bettner, 1 Bosw. 430. And the action may be brought against one or more or all the partners. Roberts *v.* Johnson, 58 N. Y. 613.

(*f*) Attorney-General *v.* Strongforth, Bunb. 97; Attorney-General *v.* Burges, Bunb. 223; Attorney-General *v.* Siddon, 1 Cr. & J. 220; United States *v.* Thomason, 4 Biss. 99.

(*g*) Nisbet *v.* Patton, 4 Rawle, 120; Holbrook *v.* Wight, 24 Wend. 169; Mitchell *v.* Williams, 4 Hill, 13. The managing partner, who conducted the business of a mine, refused to deliver up ore belonging to the former tenants of the mine, on the ground that it was partnership property, and there was subsequently a notice, by the attorney for the defendants, offering to deliver up tools that were in the same building with the ore; but the notice was silent as to the ore. Held, evidence of conversion by all the partners. Lloyd *v.* Bellis, 37 Eng. L. & Eq. 545. See Com. Dig. tit. Trespass, ch. 1; Nicoll *v.* Glennie, 1 M. & S. 588; Dore *v.* Wilkinson, 2 Stark. 287.

[1] Where one partner makes false representations or commits fraud in the course of the firm business, all the partners are liable in tort. Strang *v.* Bradner, 114 U. S.

But even if the tort were committed by a partner in the performance of the partnership business, it might, from its nature or attendant circumstances, be shown to be only a several act. As if two physicians were in partnership, and one intentionally maltreated a patient.[1] So if two were partners as bankers and bill-brokers, and one of them discounted a note usuriously, this would be his own act only, or the act of the partnership, according to his authority, or the usage of the firm, or other circumstances. (*h*)

It is to be observed that, although all the partners may be liable for a tort, and all may be sued jointly, they may also be sued severally, for, in law, all torts, however joint, and whether constructive or actual, are several. It is, therefore, no answer for a defendant sued in tort to say that others were guilty with him. (*i*)

(*h*) When one partner, without the knowledge of the other, borrows money at usurious interest, and executes a note in the name of the firm; and afterwards pays the usurious interest, and the other partner, ignorant of the payment of the usury, executes his own note in lieu of the other, he cannot, when sued upon it, set up as a defence the payment of usury by his partner. Jones *v.* Jackson, 14 Ala. 186. See Hutchins *v.* Turner, 8 Humph. 415.

(*i*) If an attorney is in partnership with another, and they carry on their business together, and their joint names are put on their papers in causes in their office, either of them is liable to the penalties of the act 37 Geo. 3 for practising as an attorney without entering his certificate, though it does not appear that one of them had any profit or advantage from the suit for suing in which the action in *qui tam* is brought. 1 Wms. Saund. 291, d; Rich *v* Pilkinton, Carth. 171; Sutton *v.* Clark, 6 Taunt. 29; Edmondson *v.* Davis, 4 Esp. 14; Attorney-General *v.* Burges, Bunb. 223; Mitchell *v.* Tarbutt, 5 T. R. 649; Stockton *v.* Frey, 4 Gill, 406. As all the partners may be affected by the tort of

555; Stanhope *v.* Swafford, 80 Ia. 45, 45 N. W. 403; Bradner *v.* Strang, 89 N. Y. 299; Peckham Iron Co. *v.* Harper, 41 Oh. St. 100. And operates by way of estoppel on all the partners. *In re* Many, 17 N. B. R. 514; French *v.* Rowe, 15 Ia. 563; Coleman *v.* Pearce, 26 Minn. 123; Henslee *v.* Cannefax, 49 Mo. 295; Griswold *v.* Haven, 25 N. Y. 595. So all the partners are liable in tort where one partner makes illegal charges. Lockwood *v.* Bartlett, 130 N. Y. 340, 29 N. E. 257. Or in the course of business commits a trespass on chattels of another. McClure *v.* Hill, 36 Ark. 268; Robinson *v.* Goings, 63 Miss. 500. Or converts the property of another. *In re* Ketchum, 1 F. R. 815. Or negligently injures property. Bucki *v.* Cone, 25 Fla. 1, 6 So. 160. Or injures another negligently. Haley *v.* Case, 142 Mass. 316, 7 N. E. 877; Hyrne *v.* Erwin, 23 S. C. 226. Or libels a customer. Woodling *v.* Knickerbocker, 31 Minn. 268, 17 N. W. 387. Or a rival firm. Haney M'f'g Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073. Or procures a wrongful attachment of property on a firm claim. Kuhn *v.* Weil, 73 Mo. 213. Or institutes a malicious prosecution. McIlroy *v.* Adams, 32 Ark. 315. It is however held in Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, that such a wilful tort as the malicious prosecution of a firm debtor is an individual act of the partner who institutes it, and the other members of the firm are not liable for it. In order to charge the firm the tort must be shown affirmatively to have been committed in the course of the business. So in an action of trover for buying goods from a thief, the true owner in order to charge a firm must prove that they were bought for the firm, not for the individual partner. Paden *v.* Bellenger, 87 Ala. 575, 6 So. 351.

[1] But the *negligent* act of one of a firm of physicians, in the course of the business, has been held to render the other members of the firm liable. Hyrne *v.* Erwin, 23 S. C. 226.

[Where an innocent partner is compelled after dissolution, to satisfy a judgment obtained for the tort of his co-partner, he may maintain an action for compensation against the actual wrong-doer,[1] since the parties are not really joint wrong-doers between whom no contribution can be claimed.]

one, so a release to one of all liability in respect of the tort will operate as a release and discharge of all. Co. Litt. 232, a; Bac. Abridg. Release (G); Com. Dig. Release, B. 4; id. Pleader, 3 M. 12; Kiffin *v.* Willis, 4 Mod. 379; Williamson *v.* McGinnis, 11 B. Mon. 74. Case is the proper action against partners for injuries caused by the negligence of their servant; and, if the damage be effected by laches simply, it will lie against them, even though one partner were present, personally, and acted in that which occasioned the damage. So, where one partner is a wilful wrong-doer, if under the circumstances any action is sustainable against his copartners, case is still the proper remedy. But, as against the malicious partners solely, trespass is the proper form of action. Mitchell *v.* Tarbutt, 5 T. R. 649; Morley *v.* Gaisford, 2 H. Bl. 442; Huggett *v.* Montgomery, 5 B. & P. 446; Leame *v.* Bray, 3 East, 593; Ogle *v.* Barnes, 8 T. R. 188; Rogers *v.* Imbleton, 5 B. & P. 117; Moreton *v.* Hardern, 4 B. & C. 223; Whiteman *v.* Smith, 12 Rich. L. 595. [Since the partners are severally liable, the innocent partner may be sued without joining the other. Mode *v.* Penland, 93 N. C. 292.]

[1] Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724.

CHAPTER VII.

OF THE RIGHTS AND DUTIES OF PARTNERS BETWEEN THEMSELVES.

SECTION I.

RIGHTS AND POWERS OF A PARTNER.

§ 106. **Right of Choice as to a Partner.** — No one among the rights of partners is more certain, or leads to more important consequences, than that to which we have already referred as implied by the phrase *dilectus personarum*. Every partnership must be, in its beginning, voluntary, and the result of the choice and wish of those who become partners.[1] Precisely so, as to admission of new partners, it must continue to be. (*a*) Hence, whatever rights a partner may have of assigning or otherwise disposing of his share of the stock or profits (a subject to be presently considered), his character or relation of partner cannot be assigned. (*b*) And if he does assign it, and the other partners

(*a*) The civilians pushed the principle of *dilectus personarum* to a great, and, as Pothier thinks, to an unreasonable extent; for with them, even a stipulation between partners, that heirs or executors should succeed to the relation of partner, was deemed to be void. Domat, lib. i. tit. 8, § 2; Pothier, *Traité du contrat de société*, ch. 8, § 3; Crawshay *v.* Maule, 1 Swanst. 509, note. The doctrine of the English and American Law is otherwise, and stipulations for the admission of such persons into a firm upon the decease of a partner are frequent, and are always, as far as possible, enforced by the courts. See Wrexham *v.* Hudleston, 1 Swanst. 514; Balmain *v.* Shore, 9 Ves. 500; Warner *v.* Cunningham, 3 Dow. 76; Gratz *v.* Bayard, 11 S. & R. 41; Scholefield *v.* Eichelberger, 7 Pet. 586; Downs *v.* Collins, 6 Hare, 418; Page *v.* Cox, 10 Hare, 163. See Reynolds *v.* Hicks, 19 Ind. 113; Buckingham *v.* Hanna, 20 Ind. 110.

(*b*) Raymond's Case, 2 Rose, 255; Kingman *v.* Spurr, 7 Pick. 235; Gilmore *v.* Black, 11 Me. 488; Moddewell *v.* Keever, 8 W. & S. 63; Cowles *v.* Garrett, 30 Ala. 341; Ketcham *v.* Clark, 6 Johns. 144; Murray *v.* Bogert, 14 Johns. 318. In Marquand *v.* New York Manuf. Co., 17 Johns. 525, Fitch assigned his interest in a partnership, by the articles of which it was provided that it should continue until two of the partners should demand a dissolution. The other partners desired the partnership to go on notwithstanding the assignment. But, per Woodworth, J.: "It is well settled in England, that an act of bankruptcy is a dissolution of partnership; this is by reason of the assignment, which severs the interest of the bankrupt, by operation of law. An assignment made by the party himself, under circumstances like the present, produces the same result: in both cases, they give rise to a state of things altogether incompatible with the

[1] Where a partner grants a part or the whole of his profits to a third person, the latter does not thereby become a partner. He cannot be made a partner without the

receive the assignee among them and into the partnership, the new partner becomes one, altogether by their reception and his agreement with them, and in no degree by the assignment or transfer by him who has ceased to be a partner. (c) In an English case, a

prosecution of a partnership concern, commenced and previously conducted by the bankrupt and his former copartners. It is perfectly clear that a new partner cannot be admitted without consent. This, *ex vi termini*, implies that even consent would be nugatory, unless the assignee elected to become a partner; when he does not so elect, but (as in the present case) insists on a division of the property, the demand, according to acknowledged general principles, cannot be denied." Mathewson *v.* Clark, 6 How. 122; Putnam *v.* Wise, 1 Hill, 238; Channel *v.* Fassitt, 16 Ohio, 166; Mason *v.* Connell, 1 Whart. 381; Horton's Appeal, 13 Pa. 67; Bray *v.* Fromont, 6 Madd. 5. In Goddard *v.* Hodges, 1 C. & M. 33, the plaintiff was the solicitor of a bridge company, and on that account, not desiring to appear as the owner of shares in a company, had procured one Fall to be the nominal stockholder of a certain number of shares, the plaintiff, however, being the real owner, making the deposits, and paying all other expense on the shares. In an action to recover compensation for professional services, the plaintiff cited Bray *v.* Fromont, *supra;* and contended that, as between himself and the bridge company, he was not a partner, since there was no consent nor agreement of the company to receive him as such. But the court held otherwise, and a non-suit was entered. See Bradley *v.* Harkness, 26 Cal. 76.

(c) The effect of an assignment by a partner of his interest in a copartnership is to give the assignee a right to insist upon an account of the joint concern, and to claim whatever his assignor would be entitled to upon a settlement of accounts, upon satisfaction of the claims of the other partners. Nicoll *v.* Mumford, 4 Johns. Ch. 522; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Marquand *v.* New York Manuf. Co., 17 Johns. 525; Kingman *v.* Spurr, 7 Pick. 235; Bray *v.* Fromont, 6 Madd. 5; Mathewson *v.* Clark, 6 How. 122; Moddewell *v.* Keever, 8 W. & S. 63. In this last case it was held, that an acquittance of a partnership debt, given by the assignee of one partner's share, could not have the effect of relieving the debtor from liability to the firm

consent of the other partners. *Ex parte* Barrow, 2 Rose, 252; Brown *v.* De Tastet, Jac. 284; Frost *v.* Moulton, 21 Beav. 596; London Assurance Corp. *v.* Drennen, 116 U. S. 461; Bybee *v.* Hawkett, 12 F. R. 649; Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495; Reynolds *v.* Hicks, 19 Ind. 113; Burnett *v.* Snyder, 76 N. Y. 344, 81 N. Y. 550; Rockafellow *v.* Miller, 107 N. Y. 507, 14 N. E. 433; Setzer *v.* Beale, 19 W. Va. 274; Riedeburg *v.* Schmitt, 71 Wis. 644, 38 N. W. 336. But it is otherwise held in Massachusetts, Baring *v.* Crafts, 9 Met. 380; Fitch *v.* Harrington, 13 Gray, 468.

For the same reason the purchaser of the interest of a deceased partner does not become a partner. Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98. And where the interest of a partner is sold on execution, the purchaser cannot insist upon being accepted as a partner. Carter *v.* Roland, 53 Tex. 540.

The name "sub-partner" is sometimes applied to the assignee of an interest in a partner's profits. Nirdlinger *v.* Bernheimer, 133 N. Y. 45, 30 N. E. 561. The term is however misleading, for he is a partner neither with the firm nor with his assignor.

Since one partner cannot admit a new member to a firm, his representations in the course of an attempt so to do cannot bind the firm. Thus where a partner agreed with a stranger that if the latter should buy out another partner he would get a third interest in the business free from all liens, this did not bind the firm. Love *v.* Payne, 73 Ind. 80.

person entering into business was guaranteed to the firm up to a certain amount by his father, and in consideration thereof contracted to pay to his father a certain sum out of the profits. Afterwards marrying, he made a marriage settlement, by which he transferred all the profits and earnings of the business to his father and another, in trust, first to secure the father's annuity, and then on other trusts. It was held by the Court of Common Pleas that the father became a partner in the business and liable for the debts. But the judgment was reversed in the Exchequer Chamber. (*cc*)

So if a partner bequeaths his interest in a firm to some one, this will not make the legatee a partner; (*d*) nor will the bequest have this effect although the legacy is expressly for the purpose of making him a partner, and is said to be a legacy of all the rights, &c., of a partner; for this character of partner is not transferable. But one who represents the interest of a former partner, if received by the other partners and treated as a partner, becomes a partner under the original articles. (*dd*) Nor is the *dilectus personarum* a right of the old partners only. It belongs just as much to the new partner. No act of any others can, of itself, make him a partner. He must himself give his consent, and enter into the firm by his own act. If a transfer of a partner's interests and rights were made with an intent on the part of the transferrer that the transferee should thereby be made a partner, he would not become one as to the others, without their and his acquiescence. (*e*)

§ 107. **Provisions in Articles for Transfer of Share.** — It is perhaps possible that the consent of the former partners may be given beforehand, and the consent of the transferee implied, by

for the same debt. *Ex parte* Barrow, 2 Rose, 252; Brown *v.* De Tastet, Jac. 284; 2 Bell Comm. 636. See Newland *v.* Tale, 3 Ired. Eq. 226; Cowles *v.* Garrett, 30 Ala. 341. The transferee of a portion of a copartner's interest has a debt which he may prove against the transferrer's estate. *Ex parte* Dodgson, Mont. & M'A. 445. But the assignee of a partner's interest cannot withdraw his share of the joint effects. They must remain in the possession of the continuing partner, for the purpose of winding up the affairs of the partnership, which has been dissolved by the assignment. Horton's Appeal, 13 Pa. 67; Meaher *v.* Cox, 37 Ala. 201.

(*cc*) Bullen *v.* Sharp, 18 C. B. N. S. 614; L. R. 1 C. P. 86.

(*d*) Nor are the executors of a deceased partner, nor the assignees of a bankrupt one, partners with the other member of the original firm. They are simply entitled to an account. Pearce *v.* Chamberlin, 2 Ves. 33; Wilson *v.* Greenwood, 1 Swanst. 482; Fox *v.* Hanbury, Cowp. 445; Hague *v.* Rolleston, 4 Burr. 2177; *Ex parte* Williams, 11 Ves. 5; Griswold *v.* Waddington, 15 Johns. 82; Marquand *v.* New York Manuf. Co., 17 Johns. 535; Kingman *v.* Spurr, 7 Pick. 238.

(*dd*) Meaher *v.* Cox, 37 Ala. 201.

(*e*) See Marquand *v.* New York Manuf. Co., 17 Johns. 529, 535, and other cases cited in preceding notes.

the reception of the things transferred. If, for example, a joint stock company, which is a kind of partnership, provided by its rules that the shares should be regarded and treated as transferable, and as a kind of scrip; that each share was such an aliquot part of the whole, or represented a certain amount of money, and one man might hold a number of them; and if it was farther provided that a sale of a share, acknowledged before the clerk, and recorded, with a delivery of the former certificate and the issue of a new one, would make the holder of the new certificate one of the company; in such case the transferee becomes at once a stockholder, which in this case would mean a partner, by the completion of the transfer according to the rules of the company. (*f*) And it is possible, also, that the articles of a private

(*f*) This would seem to be a legitimate conclusion from the opinion of the court in Fox *v.* Clifton, 9 Bing. 115, 6 Bing. 776. There several persons were sued as partners in a distillery company. It was in evidence that, such a company being in process of formation, upon payment of a deposit, scrip receipts were issued to the subscribers, which were to be surrendered for certificates of shares, when the partnership deed was prepared and signed; that the scrip of the company was openly sold in the market; the persons producing that scrip, and paying the instalments due, were, without further inquiry, permitted to sign the company's deed as partners; and that Levi, one of the defendants, had, before the contract was made upon which the present suit was brought, sold his scrip. C. J. Tindal: "The present case appears not to be governed by reference to the rules which restrain partners from parting with their shares in ordinary cases, without each other's consent; for, in this case, the power of transferring the scrip to any one cannot but have formed a part of the known original design." After adding that at the time the contract was entered into with the plaintiff, Levi was not and could not be a partner: "On the other hand, the man who had purchased his scrip, if he was willing to pay up the second instalment, would have been entitled and allowed to receive a certificate of his share, and to execute the deed without difficulty." But where, as supposed in the text, the articles of an association prescribe a particular method of transferring shares, that mode must be strictly followed; for the formalities of transfer are the terms or conditions upon which the members of the company give their consent to the admission of a new partner. Ness *v.* Angas, 3 Exch. 805, 814; Dodgson *v.* Bell, 5 Exch. 967; Kingman *v.* Spurr, 7 Pick. 235: Cochran *v.* Perry, 8 W. & S. 262. In *Ex parte* Wood, Keene's Executors' Case, De G. M. & G. 272, a joint-stock company may, by long acquiescence in the neglect of its directors to carry out one or more of its regulations respecting the transfer of shares, and the admission of new shareholders, be precluded from taking advantage of such informality in the transfer of shares; and, further, that a shareholder, thus irregularly introduced into a company, if he has become *de facto* a shareholder, is debarred from raising an objection of form against the company, so as to relieve himself from the obligations of a shareholder. Bargate *v.* Shortridge, 5 H. L. C. 297. And though, by articles of copartnership, it is provided that any partner may assign his share of the stock by a certificate in writing, which, when lodged with the clerk of the company, shall entitle the assignee to all the privileges, and subject him to all the liabilities, of an original partner, an assignment without such certificate will, nevertheless, transfer the property. Alvord *v.* Smith, 5 Pick. 232.

partnership might contain similar provisions, with a system of transfer to carry them into effect. But it remains true, that the consent and acquiescence of all the members of a partnership are necessary to its becoming a partnership, however or whenever this consent and acquiescence take place, or may be proved, implied, or inferred.[1]

§ 108. **Right of assigning or transferring Property.** — The right of every partner to sell, assign, or transfer, any part or the whole of the partnership property, in the way of the regular business of the partnership, is absolute and unquestioned. (*ff*) There is an exception to this rule in reference to the real estate of a partnership, (*fg*) but none as to the personal property. Suppose a partnership dealt in buying and selling cotton, and all their stock consisted in five hundred bales stored in New York; there is no more doubt that either one of the partners might sell, and give good title to the whole, than that he could do so with a single bale. (*g*) This, however, must be done in the regular course of

(*ff*) For an interesting case on the question, If one acting as a partner sells, without the consent of his copartner, what amounts to a ratification of the sale? see Cheeseman *v.* Sturges, 9 Bosw. 246.

(*fg*) See *post*, § 277.

(*g*) The absolute *jus disponendi* of each partner over the effects of the partnership is very early asserted in Lambert's Case, Godb. 244. See Barton *v.* Williams, 5 B. & Ald. 405, per Best, J.; Lyles *v.* Styles, 2 Wash. C. C. 224; Pearpoint *v.* Graham, 4 Wash. C. C. 234; Law *v.* Ford, 2 Paige, 310; Winship *v.* Bank of the United States, 5 Pet. 561; Lamb *v.* Durant, 12 Mass. 54; Pierson *v.* Hooker, 3 Johns. 70, per Kent, C. J.; M'Cullough *v.* Sommerville, 8 Leigh, 430; Tapley *v.* Butterfield, 1 Met. 518; Whitton *v.* Hulbert, Freeman, Ch. 231; Forkner *v.* Stuart, 6 Gratt. 197; Fromme *v.* Jones, 13 Iowa, 474. In Anderson *v.* Tompkins, 1 Brock. 456, Chief Justice Marshall affirms this power in the most positive terms. Boswell *v.* Green, 1 Dutch. 390; [Ellis *v.* Allen, 80 Ala. 515]; McGregor *v.* Ellis, 2 Dis. (Supr. Ct. Cin.) 286. A partner's *jus disponendi* extends to choses in action as well as those in possession. See Swan *v.* Steele, 7 East, 210; Harrison *v.* Sterry, 5 Cranch, 289, 300; Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 482; Mills *v.* Barber, 4 Day, 428; Halstead *v.* Shepard, 23 Ala. 558, 573. [Fulton *v.* Loughlin, 118 Ind. 286, 20 N. E. 796; Clarke *v.* Hogeman, 13 W. Va. 718; see Kull *v.* Thompson, 38 Mich. 685. So a partner may assign a patent right belonging to the firm. Christ *v.* Firestone, (Pa.) 11 Atl. 395. So he may indorse commercial paper. Fulton *v.* Loughlin, 118 Ind. 286, 20 N. E. 796; Walker *v.* Kee, 14 S. C. 142, 16 S. C. 76. Or assign a chattel mortgage Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538.] One partner may bind his firm by assenting to the transfer of a debt on account, due from the firm, from one banker to another. Beale *v.* Caddick, 2 H. & N. 326. This right is in no way affected by a secret act of bankruptcy previously committed by another partner. Fox *v.* Hanbury, Cowp. 445. Nor by the fact that

[1] A voluntary association with transferable and heritable shares is valid at common law. Ricker *v.* American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284; McFadden *v.* Leeka, 48 Oh. St. 513, 28 N. E. 874; McNeish *v.* Hulless Oat Co., 57 Vt. 316. Some of its affairs are frequently regulated by statute. Davison *v.* Holden, 55 Conn. 103, 10 Atl. 575; People *v.* Wemple, 117 N. Y. 136, 22 N. E. 1046. See *post*, ch. 18.

the business of the firm; for outside of this he has no such power. (*h*) If he does this in fraud of the other partners, — that is, if he sells the whole, or any part, intending to run off with the proceeds, and does run off with them, — this has no effect on the title of the purchaser, unless he has some knowledge of the fraud, or would have had some knowledge of it but for a negligence so gross as would tend to imply fraud. (*i*) [1]

§ 109. **Right to pledge or mortgage.** — If, however, a partner undertakes not to sell the goods or property of the partnership, but to assign them, by way of pledge or mortgage to secure the debts of the firm, or in any unusual way, he has not *necessarily* any power to do this. Neither do we consider it certain that he has no power to do it. On the one hand, such a transaction seldom or never belongs to the regular business of a firm. (*j*) If

the proceeds arising from a transfer of partnership effects have not come to the use nor to the advantage of the firm. Arnold *v.* Brown, 24 Pick. 89. Nor, in point of principle, is there any difference between so-called general partnerships and those for a special adventure as to the power possessed by each partner of disposing of the joint property. Livingston *v.* Roosevelt, 4 Johns. 251, 265, 277. See the language of Best, J., in Barton *v.* Williams, 5 B. & Ald. 405. [See on this subject Ames, Cas. on Part., 572 *n.*].

(*h*) 2 Chan. Cases, temp. Car. 2, 32, 38. Anon., 16 Vin. Abr. 242. See Livingston *v.* Roosevelt, 4 Johns. 266, 267, 278; Walden *v.* Sherburne, 15 Johns. 422; [Wilcox *v.* Jackson, 7 Col. 521.] See the remarks of Marshall, C. J., in Anderson *v.* Tompkins, 1 Brock. 460; Rogers *v.* Batchelor, 12 Pet. 221. See farther, as to this point, section 3d, subsection 2d, of this chapter, on the general extent of the power of a partner; and see Wells *v.* March, 30 N. Y. 344; Coope *v.* Bowles, 42 Barb. 87; Palmer *v.* Myers, 43 Barb. 509.

(*i*) So it was said by Marshall, C. J., in Anderson *v.* Tompkins, 1 Brock. 460. An assignment by one partner of partnership assets to another, to be applied to the individual purposes of the latter, is a breach of trust in both assignor and assignee, and void as to the firm. Wood *v.* Shepherd, 2 Patt. & Heath, 442; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Halstead *v.* Shepard, 23 Ala. 558; Clayton *v.* Hardy, 27 Mo. 536; Croughton *v.* Forrest, 17 Mo. 131. In this last case, where one partner fraudulently disposed of all the partnership stock and effects, the vendees, who had received the property with knowledge of the fraud or without consideration, were held to be trustees thereof for the benefit of the firm. See Kirkpatrick *v.* Turnbull, Addison, 259; Rogers *v.* Batchelor, 12 Pet. 221. [Ellis *v.* Allen, 80 Ala. 515 (*semble*).]

(*j*) In Metcalf *v.* Royal Exch. Ass. Co., Barnard. 343, it seems to be implied that a pledge of partnership effects, in the exercise of a power which belongs to the general course of business of a trading partnership, is valid. See the remarks of

[1] It would seem that a partner who has power to sell part of the firm chattels, — that is, the chattels kept for sale, has power to sell them all for cash. Ellis *v.* Allen, 80 Ala. 515, 2 So. 676; Crites *v.* Wilkinson, 65 Cal. 559, 4 Pac. 567; Coakley *v.* Weil, 47 Md. 277; Schneider *v.* Sansom, 62 Tex. 201. But it seems that a sale not merely of the goods kept for sale but of all the assets of the business is not within the partnership powers, and may be avoided by the other partner. Drake *v.* Thyng, 37 Ark. 228; Wilcox *v.* Jackson, 7 Col. 521. Such a sale would of course transfer all the interest of the partner who made the sale. Carrie *v.* Cloverdale Banking & Commercial Co., 90 Cal. 84, 27 Pac. 58.

it does, of course he has this power. If it does not, it may still be so far connected with, or so naturally arise out of or promote, their regular business, that if the transaction be an honest one, without bad faith on the part of any party, we should say it was a valid transaction, which the law would enforce. Perhaps a consideration of the authorities and of the reason of the case would lead to this difference between the selling and the assigning in pledge of partnership property by one partner. If the sale take place in the course of business, it would bind the other partners, as we have seen, though fraudulent as to them; but an assignment in pledge or mortgage, not being in the way of business, would bind the other partners, if it were done in good faith for the advantage of the firm, and was reasonable in itself, but not otherwise. (*k*)

§ 110. **Right to assign for Benefit of Creditors.** — One partner may, in good faith, assign a part of the property to pay or secure

Shaw, C. J., in Tapley *v.* Butterfield, 1 Met. 515, where a mortgage by one partner of the whole stock in trade of a partnership, to secure a creditor, was held valid. Anderson *v.* Tompkins, 1 Brock. 456; Deckard *v.* Case, 5 Watts, 22. See also Milton *v.* Mosher, 7 Met. 244; Brownrigg *v.* Rae, 5 Exch. 489; Sweetzer *v.* Mead, 5 Mich. 107. In *Ex parte* Lloyd, 1 Mont. & A. 494, it seems to have been considered that the peculiar circumstances of that case authorized one partner to bind his firm by an equitable mortgage. There, W., being the sole owner of certain freehold premises, entered into partnership with O., and W. & O. thenceforth occupied the premises as cotton spinners, and erected a steam-engine, &c., for the purposes of their joint trade. The firm being indebted to their bankers, O., in June, 1822, deposited with them the leases of certain leasehold premises, with a memorandum setting out a list of the title-deeds deposited, and concluding thus: "These papers are placed in the hands of Messrs. Jones, Lloyd, & Co., as security for what they may think fit to advance to O. & W." In August, 1822, W. also deposited with them a lease of a freehold piece of land, on which was situated a mill and other buildings, with the following memorandum: "These deeds of, &c., are placed in the hands of Messrs. Lloyd & Co., as security for what they may think proper to advance to O. & W., by W. The buildings alone are insured for upwards of 2,000*l.*; machinery, &c., 2,000*l.* more." O. & W. having become bankrupt, and the bankers petitioning to be declared equitable mortgagees of the premises, the court thought that, under the circumstances, there was no difficulty in finding that the one partner had authority to pledge the property, in order to obtain an advance of money for partnership purposes; and that W. might fairly be taken as mortgaging, for himself, his own freehold interest in the land and buildings, and as agent for the firm, mortgaging the leasehold interest and the property of the firm in the machinery.

(*k*) In the three following cases, where partnership property was pledged without any fraud or collusion, or any knowledge on the part of the pledgee of the interest of the firm in the pledge, the contract was held to bind the copartnership. Raba *v.* Ryland, Gow, 132; Tupper *v.* Haythorne, Gow, 135, n.; Reid *v.* Hollinshead, 4 B. & C. 867, s. c. 7 D. & R. 444. On the other hand, in *Ex parte* Copeland, 2 Mont. & A. 177, s. c. 3 Dea. & Ch. 199, two of the judges strongly intimate their opinion that, if at the time of a pledge by one partner the pledgee is conusant of the joint interest of the other partners, such pledge will not be valid as against the other partners. See *Ex parte* Gellar, 1 Rose, 297; Snaith *v.* Burridge, 4 Taunt. 684.

an existing debt, or a debt to be contracted. (*l*)[1] [There is some doubt, however, whether he has power to assign the whole property in trust for all the creditors. His power to transfer firm property generally is within the scope of the firm business, since the object of the business is to dispose of such property. But the assignment of all the property in trust for creditors is necessarily outside the scope of the business, since it puts an end to the business. The better opinion therefore seems to be that in the ordinary case one partner has no power to assign all the assets in trust for creditors without the consent of the other partners.[2] But

It appears, from the above cases, that there is no distinction between general partnerships and those for a particular adventure, as to the power in each partner to pledge, mortgage, &c., the partnership effects.

(*l*) See McClelland *v.* Remsen, 14 Abb. Prac. 332; Young *v.* Keighly, 15 Ves. 557; Mills *v.* Barber, 4 Day, 428; Fox *v.* Hanbury, Cowp. 445; Harrison *v.* Sterry, 5 Cranch, 289; Dana *v.* Lull, 17 Vt. 390. In Deming *v.* Colt, 3 Sandf. 290, Oakley, C. J., speaking of the law of New York, says that it is settled in that State, "that one partner may, from time to time, without the assent of his copartner, assign and deliver specific portions of partnership property to a creditor of the firm in payment of a debt; that, inasmuch as it is in the power of one member of a firm to pay off a debt, he may pay it in a specific chattel actually delivered to the creditor, as well as in money." Anderson *v.* Tompkins, 1 Brock. 461; Hodges *v.* Harris, 6 Pick. 360; Tapley *v.* Butterfield, 1 Met. 518; Havens *v.* Hussey, 5 Paige, 31, 32; Everet *v.* Strong, 5 Hill, 163, 7 Hill, 585; Kirby *v.* Ingersoll, 1 Hare (Mich.), 172, s. c. 1 Doug. (Mich.) 477; Cullum *v.* Bloodgood, 15 Ala. 34; Boswell *v.* Green, 1 Dutch. 390. See McNutt *v.* Strayhorn, 39 Pa. 269.

[1] It is almost universally held that a partner has authority to pledge or mortgage part of the property to secure a firm debt. Gates *v.* Bennett, 33 Ark. 475; Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19; McCarthy *v.* Seisler, 130 Ind. 63, 29 N. E. 407; Citizens' Nat. Bank *v.* Johnson, 79 Ia. 290, 44 N. W. 551; Schwanck *v.* Davis, 25 Neb. 196, 41 N. W. 141; Hembree *v.* Blackburn, 16 Ore. 153, 19 Pac. 73; Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452; Hage *v.* Campbell, 78 Wis. 572, 47 N.W. 179. *Contra*, Osborne *v.* Barge, 29 F. R. 725. Since he may give such a mortgage, he may consent to its cancellation. Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19. It would seem that such a mortgage is good if it covers all the chattels of the firm. Letts-Fletcher Co. *v.* McMaster (Ia.), 49 N. W. 1035; and see the cases cited *supra*. But see Burbank *v.* Wiley, 79 N. C. 501. A partner has also authority to pass absolute title to partnership chattels in payment of a firm debt. Hanchett *v.* Gardner, 138 Ill. 571, 28 N. E. 788; Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625. "We can conceive of no partnership, whether commercial or non-trading, which may not, in the line of the partnership business, incur debts. . . . We regard it as thoroughly well-settled law that a partnership, or any one of its members, without express authority from his co-partners, may transfer a part of the partnership property in payment of a debt of the firm, and this wholly regardless of the non-trading character of the concern." McClellan, J., in Ullman *v.* Myrick, 93 Ala. 532, 536, 8 So. 410.

[2] Pearpoint *v.* Graham, 4 Wash. C. C. 232; Adams *v.* Thornton, 82 Ala. 260, 3 So. 20; Loeb *v.* Pierpoint, 58 Ia. 469, 12 N. W. 544; Hunter *v.* Waynick, 67 Ia. 555, 25 N. W. 776; Shattuck *v.* Chandler, 40 Kas. 516, 20 Pac. 225, Maughlin *v.* Tyler, 47 Md. 545; Kirby *v.* Ingersoll, 1 Doug. Mich. 477; Stein *v.* La Dow, 13 Minn. 412; Hughes *v.* Ellison, 5 Mo. 463; Einer *v.* Beste, 32 Mo. 240, 39 Mo. 69; Hook *v.* Stone, 34

if the other partners are absent and cannot be come at to be consulted, one partner who is thus left in charge of the business may in an emergency make a general assignment.[1]]

§ 111. **Assignment by surviving Partner.** — If a partner die, the

Mo. 329; Steinhart *v.* Fyhrie, 5 Mont. 463, 6 Pac. 367; Hitchcock *v.* St. John, Hoff. Ch. 511; Havens *v.* Hussey, 5 Paige, 30; Fisher *v.* Murray, 1 E. D. Smith, 341; Deming *v.* Colt, 3 Sandf. 284; Hayes *v.* Heyer, 3 Sandf. 293; Holland *v.* Drake, 29 Oh. St. 441; Daniels, Petitioner, 14 R. I. 500; Williams *v.* Roberts, 6 Cold. 493; Turner *v.* Duglass, 77 Tex. 619, 14 S. W. 221; Dana *v.* Lull, 17 Vt. 390; Coleman *v.* Darling, 66 Wis. 155, 28 N. W. 367. See Wilcox *v.* Jackson, 7 Col. 521; Simmons *v.* Curtis, 41 Me. 373; Mabbett *v.* White, 12 N. Y. 442; Wetter *v.* Schlieper, 4 E. D. Smith, 707; McCullough *v.* Sommerville, 8 Leigh, 415. There are a few decisions which uphold the power of a single partner to make a general assignment. Anderson *v.* Tompkins, 1 Brock. 461 (*semble*); Hennessy *v.* Western Bank, 6 W. & S. 300; Robinson *v.* Crowder, 4 McC. 519; Graves *v.* Hall, 32 Tex. 665; Gordon *v.* Cannon, 18 Gratt. 387; Scruggs *v.* Burruss, 25 W. Va. 670. If one partner expressly objects the other certainly has no power to make a general assignment. Adams *v.* Thornton, 82 Ala. 260, 3 So. 20; Williams *v.* Roberts, 6 Cold. 493. If the other partners assent to an assignment or ratify it the assignment is valid, though made by a single partner. Osborne *v.* Barge, 29 F. R. 725; Adee *v.* Cornell, 93 N. Y. 572; Klumpp *v.* Gardner, 114 N. Y. 153, 21 N. E. 99; Hooper *v.* Baillie, 118 N. Y. 413, 23 N. E. 569. Such assent must be made to appear affirmatively. Steinhart *v.* Fyhrie, 5 Mont. 463. If the assignment is without authority it of course conveys no property of the firm; and though a ratification by the other partners generally makes it good from its date, those who acquire a lien on the property meanwhile, as, for instance, attaching firm creditors, may hold in spite of the ratification. Loeb *v.* Pierpoint, 58 Ia. 469, 12 N. W. 544; Stein *v.* La Dow, 13 Minn. 412; Kittrell *v.* Blum, 77 Tex. 336, 14 S. W. 69; Coleman *v.* Darling, 66 Wis. 155, 28 N. W. 367. But see Adee *v.* Cornell, 93 N. Y. 572.

[1] Harrison *v.* Sterry, 5 Cranch, 289; Anderson *v.* Tompkins, 1 Brock. 456; Loeb *v.* Pierpoint, 58 Ia. 469, 12 N. W. 544; Hunter *v.* Waynick, 67 Ia. 555, 25 N. W. 776; Kirby *v.* Ingersoll, 1 Doug. Mich. 477; Stein *v.* La Dow, 13 Minn. 412; Holland *v.* Drake, 29 Oh. St. 441; Deckard *v.* Case, 5 Watts, 22; Daniels, Petitioner, 14 R. I. 500; Robinson *v.* Crowder, 4 McCord, 519; Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625 (*semble*); McCullough *v.* Sommerville, 8 Leigh, 415; Williams *v.* Gillespie, 30 W. Va. 586, 5 S. E. 210; First Nat. Bank *v.* Hackett, 61 Wis. 335, 21 N. W. 280; Coleman *v.* Darling, 66 Wis. 155, 28 N. W. 367. In Dickinson *v.* Legare, 1 Desaus. 537, the earliest case upon the subject, a contrary decision was made. But, in that instance, "the assignment, being made by a citizen of one of the United States during the existence of a war, to an alien enemy and in an enemy's country, was probably void by the laws of war, so far at least as to prevent its being carried into effect by any of the courts of this country." Per Chancellor Walworth, in Egberts *v.* Wood, 3 Paige, 517, 524. And in effect the case is overruled by the subsequent case of Robinson *v.* Crowder, 4 McC. 519. See Kimball *v.* Hamilton Fire Ins. Co., 8 Bosw. 495.

In New York, however, absence of one partner will not give power to the others to make a general assignment in trust for creditors. Robinson *v.* Gregory, 30 N. Y. 350 (cited); Coope *v.* Bowles, 42 Barb. 87; Palmer *v.* Myers, 43 Barb. 509 (see earlier decisions, however, — Deming *v.* Colt, 3 Sandf. 291; Fisher *v.* Murray, 1 E. D. Smith, 341; Robinson *v.* McIntosh, 3 E. D. Smith, 221; Kemp *v.* Carnley, 3 Duer, 1). But if a partner absconds, the others may make such assignment. Palmer *v.* Myers, 43 Barb. 509.

It was held in Stein *v.* La Dow, 13 Minn. 412, that the mere temporary absence of one partner will not give the other power to assign in trust for creditors.

surviving partners may undoubtedly apply the effects of the partnership to the payment of its debts, without consulting at all the representatives of the deceased. (*p*) [1]

§ 112. **Assignment of individual Share.** — The power of each partner over his own share or interest in the partnership property stands upon an entirely different footing from his power over the partnership property generally. It is certain that no partner has any exclusive right to any one or more things of the partnership. (*q*) If, in the case supposed before, the partnership owning

(*p*) Egberts *v.* Wood, 3 Paige, 517; Wilson *v.* Soper, 13 B. Mon. 411; though, where there is more than one survivor, one of them cannot assign the whole interest in the partnership effects to trustees, for the benefit of preferred creditors, without the concurrence of the other. Egberts *v.* Wood, *supra*. The remaining partners have the same rights as against an assignee of all one partner's interest. Clark *v.* Wilson, 19 Pa. 414. As to whether, when one of the partners is dormant, a deed of assignment of all the partnership property, by the other partner or partners, for the benefit of creditors, is valid without being executed by him, see Egberts *v.* Wood, *supra*; Drake *v.* Rogers, 6 Mo. 317. Whether the general partners in a limited partnership may make a general assignment of the joint funds, without the consent of the special partner, was doubted in Mills *v.* Argall, 6 Paige, 577. See *post*, ch. 17.

(*q*) Hence no general principle of the law of partnership is better settled than that nothing is to be considered the share of any one partner but his proportion of the residue on the balancing of the partnership accounts. Accordingly, where a member of a copartnership sold and assigned to another "all his interest in and to the property, goods, wares, and merchandise, and debts belonging to the firm," it was held that a debt owing by himself to the firm did not pass by the assignment; the interest of the assignor being only what remained over and above the amount of his indebtedness to the firm. Van Scoter *v.* Lefferts, 11 Barb. 140. [Painter *v.* Painter, 68 Cal. 395, 9 Pac. 450; Norman *v.* Hudleston, 64 Ill. 11; Over *v.* Hetherington, 66 Ind. 365; Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476; Houk *v.* Walker, (Ind.) 30 N. E. 1080; Wiggin *v.* Goodwin, 63 Me. 389; Lambert *v.* Griffith, 50 Mich. 286, 15 N. W. 458; Finley *v.* Fay, 17 Hun, 67.] See further Fox *v.* Hanbury, Cowp. 445; Smith *v.* De Silva, Cowp. 469; West *v.* Skip, 1 Ves. 239; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 5; Taylor

[1] A surviving partner may pledge or mortgage the firm assets to secure firm debts. Bradford Commercial Banking Co. *v.* Cure, 31 Ch. D. 324; Bohler *v.* Tappan, 1 F. R. 469; First Nat. Bank *v.* Parsons, 128 Ind. 147, 27 N. E. 486. *Contra*, Anderson *v.* Norton, 15 Lea, 14, on the ground that a surviving partner cannot give preference to a creditor. So a surviving partner may make a valid assignment for the benefit of firm creditors. Emerson *v.* Senter, 118 U. S. 3; Shattuck *v.* Chandler, 40 Kas. 516, 20 Pac. 225 (*semble*); Atchison *v.* Jones, (Ky.) 1 S. W. 406; Gable *v.* Williams, 59 Md. 46 (*semble*); Riley *v.* Carter (Md.), 25 Atl. 667; Hanson *v.* Metcalf, 46 Minn. 25, 48 N. W. 441; Haynes *v.* Brooks, 116 N. Y. 487, 22 N. E. 1083; Farmers' Bank *v.* Ritter, (Pa.) 12 Atl. 659. According to the better view, such an assignment is good even if one creditor is preferred. Williams *v.* Whedon, 109 N. Y. 333, 16 N. E. 365; Beste *v.* Burger, 110 N. Y. 644, 17 N. E. 734 (overruling Nelson *v.* Tenney, 36 Hun, 327); Patton *v.* Leftwich, 86 Va. 421, 10 S. E. 686. And see Roach *v.* Brannon, 57 Miss. 490; Krueger *v.* Speith, 8 Mont. 482, 20 Pac. 664. *Contra*, Salsbury *v.* Ellison, 7 Col. 167, 2 Pac. 906, 3 Pac. 485, on the ground that a surviving partner is a trustee for creditors. See *post*, § 345.

the cotton agreed not to sell it, no one partner could separate ten bales, and say to a customer, The firm will sell nothing; but I will take these as my own, and will sell them to you. Such a sale would pass no title whatever. (*r*) The property sold would be available for the debts of the partnership; and so, perhaps, would any property into which it was converted, so long as that could be distinctly traced and identified. (*s*)

Any partnership would probably consent that a partner might take a part of their goods on his own account, and would charge the same to him. But without such consent, express or implied, it is quite clear that he can appropriate nothing to himself. Every partner owns the whole partnership property, subject to the equal ownership of every other partner; and no one partner can make his own ownership of any part absolute, and relieve it from the encumbrance of the ownership of the others without their consent. Because each partner owns the property of the

v. Fields, 4 Ves. 396, 559; Holdernen *v.* Shackles, 8 B. & C. 612; Eddie *v.* Davidson, 3 Doug. 650; Pierce *v.* Jackson, 6 Mass. 243; Fisk *v.* Herrick, 6 Mass. 271; Doner *v.* Stauffer, 1 Pen. & W. 198; Church *v.* Knox, 2 Conn. 514, 518; Conwell *v.* Sandidge, 8 Dana, 278; Hodges *v.* Holeman, 1 Dana, 53; Pierce *v.* Tiernan, 16 G. & J. 253; Commercial Bank *v.* Wilkins, 9 Me. 28; Murray *v.* Murray, 5 Johns. Ch. 70; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Rodriguez *v.* Heffernan, 5 Johns. Ch. 428; Greene *v.* Greene, 1 Ohio, 251; Sumner *v.* Hampson, 8 Ohio, 330; Dyer *v.* Clark, 5 Met. 575; Lingen *v.* Simpson, 1 Sim. & St. 603. We shall be obliged to consider this question of the interest of one partner in partnership property more in detail, when we treat of the remedies of third persons against partners, and of partners *inter se.* See *post*, §§ 179, 255. In Lovejoy *v.* Bowers, 11 N. H. 404, it was held that one partner cannot sell or mortgage an undivided interest in a specific part; the property belonging to the partnership. The property constitutes a fund or capital to carry on the business of the partnership, and to pay partnership creditors; and the separate interest of each partner is an interest in the surplus. Morrison *v.* Blodgett, 8 N. H. 231.

(*r*) See Rogers *v.* Batchelor, 12 Pet. 221.

(*s*) Croft *v.* Pyke, 3 P. Wms. 180. In West *v.* Skip, 1 Ves. 239, Lord Chancellor Hardwicke asserted the general principle, that the "partner's lien" (which is nothing but the right of the partnership to its own property) is not appropriated to the original stock alone, but attaches to whatever is substituted in its place. He said that a partnership lien "is not considered as appropriated to the stock brought in, but to every thing coming in lieu during the continuance or after the determination of the partnership. As in Bucknal *v.* Roiston, Pre. Ch. 285, where a lien was held to be on those goods which were the produce of the original goods. So in Brown *v.* Heathcote, Michael. T. 1749, it was held that it continued on what was the produce by way of barter and sale; and that holds much more strongly in the case of a partnership trade which cannot otherwise be continued." The cases of Skip *v.* Harwood, 2 Swanst. 586, and of Ridgley *v.* Carey, 4 Har. & M'H. 167, come yet nearer to the proposition of the text. Of course, however, this doctrine is not pushed to the extent of saying, that what at any time during the partnership has been part of the partnership effects shall in all future time remain part of the partnership effects, notwithstanding a *bonâ fide* transmutation. *Ex parte* Ruffin, 6 Ves. 119.

firm, it has been held that one of two partners cannot be guilty of burglary or larceny as to a house or property owned by the firm. (*ss*)

But although no partner owns absolutely any part of the property, he has his own interest in the whole; which interest we have defined as an ownership of the whole, subject to the ownership of the other partners. And the question has repeatedly arisen, whether he can sell and transfer this interest. The answer, in general, is in the affirmative. (*t*) But a court of equity will not foreclose a mortgage made by a partner of his interest in the partnership property to secure his individual debt, if the property of the partnership will not more than pay the debts of the partnership. (*tt*)

It may be added, that while partners may own the partnership property in whatever proportions they choose, they are presumed, in the absence of evidence, to have equal interests. (*ttt*)

This power of sale must, however, be subject to many qualifications. It is plain, from what was said in the preceding section, that he cannot make his transferee a partner in his place, without the consent of the others. But, if he can transfer his interest at all, he must be able to give to the transferee some of his powers as partner, in order to make the transfer available. Thus, he must give to him the power of requiring an account and settlement of the concern, or, at least, some just and adequate ascertainment and setting off in severalty of his share. (*u*)

For this purpose, the transferee must go into equity; for it is not easy to see how he could, by means of trover or replevin or case or assumpsit, find a full and sufficient remedy. But, if he goes into equity, he must be prepared to do equity, and to submit to the application of the principles of equity to his case. If, therefore, the articles expressly forbid such transfer; or if they provide for a continuance for a time certain, or by any other provisions indirectly negative the right of transfer, or affix to it, as in the case of joint-stock companies, certain conditions and requirements, which have been disregarded; or if the nature of the business,

(*ss*) Alfele *v.* Wright, 17 Ohio, 238.

(*t*) See Raymond's Case, 2 Rose, 255; Kingman *v.* Spurr, 7 Pick. 255; Gilmore *v.* Black, 11 Me. 488; Moddewell *v.* Keever, 8 W. & S. 63; Ketcham *v.* Clark, 6 Johns. 144; Marquand *v.* N. Y. Manuf. Co., 17 Johns. 525; Mathewson *v.* Clark, 6 How. 122; Horton's Appeal, 13 Pa. 67; Bray *v.* Fromont, 6 Mod. 5; Wilson *v.* Bowden, 8 Rich. 9; Armstrong *v.* Fahnestock, 19 Md. 59; Norris *v.* Vernon, 19 Md. 13.

(*tt*) Jones *v.* Parsons, 25 Cal. 100.

(*ttt*) Moore *v.* Bare, 11 Iowa, 198.

(*u*) See preceding notes, and Nicoll *v.* Mumford, 4 Johns. Ch. 522; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; *Ex parte* Barrow, 2 Rose, 252.

the especial purpose of the partnership, the method of transfer, or any of the circumstances attending it, make it impossible for the transfer to be enforced, — a court of equity would probably either refuse to sanction the transfer at all, or would attach to their enforcement of it conditions and provisions which would prevent it from working a mischief. Subject to these qualifications, every partner has, at common law, an unquestionable right of divesting himself, in good faith, of his interest in the partnership, in favor of a third party. But, taking them into consideration, we think it an accurate expression of the rule to say that no partner has a right to transfer the whole of his interest in the partnership stock to a stranger, unless he has a right to dissolve the partnership. Indeed, as we shall see in a subsequent chapter, such a transfer works a dissolution.

§ 113. **Right to Purchase.** — As with sales so with purchases: a purchase by one partner, in the course and within the scope of the regular business of the firm, binds the partnership. (*a*) [1]

(*a*) The principle is laid down in a case as early as 1696, Hyat *v.* Hare, Comb. 383. See Bond *v.* Gibson, 1 Camp. 185; Dyke *v.* Brewer, 2 C. & K. 828; per Brainerd, J., in Mills *v.* Barber, 4 Day, 430; Dougal *v.* Cowles, 5 Day, 515; per Spencer, J., in Walden *v.* Sherburne, 15 Johns. 422; Braches *v.* Anderson, 14 Mo. 441; Dubois's Appeal, 38 Pa. 231.

[1] So the purchase of the lease of a brewery by one of a firm of brewers is within the scope of the business, and one partner may bind the firm by making it. Stillman *v.* Harvey, 47 Conn. 26.

But the purchase of the interest of a partner is not within the scope of the partnership business; and one partner in making it is not acting for the firm. Cassels *v.* Stewart, 6 App. Cas. 64; Summerlot *v.* Hamilton, 121 Ind. 87, 22 N. E. 973.

Where one of a firm of brokers, being the managing partner, agreed with a purchaser of bonds on behalf of the firm to repurchase the bonds at any time for the price paid, this was held apparently within the scope of the partnership business. Johnston *v.* Trask, 116 N. Y. 136, 22 N. E. 377.

But one partner cannot without consent of the others accept in payment of a firm debt shares in a company the owner of which becomes liable as a contributory. Niemann *v.* Niemann, 43 Ch. D. 198 (C. A.).

A purchase by one partner, though in fraud of the partnership, binds the copartnership, if made *bonâ fide* and without gross negligence on the part of the vendor. Bond *v.* Gibson, 1 Camp. 185; Dixon *v.* Alexander, 7 Ired. 4. See Walden *v.* Sherburne, 15 Johns. 422, 423; also, *ante*, § 84, as to the effect of stipulations between partners which are known to those who deal with them. And see Salomons *v.* Nissen, 2 T. R. 674; Treadwell *v.* Williams, 9 Bosw. 649; Morrison *v.* Atwell, 9 Bosw. 503.

So the partner may buy land for the firm if it is needed for the firm business. Davis *v.* Cook, 14 Nev. 265.

But the goods bought must be in the line of the firm business, unless the purchase is ratified. Porter *v.* Curry, 50 Ill. 319; Biggs *v.* Huberts, 14 S. C. 620; Bankhead *v.* Alloway, 6 Coldw. 56.

The firm is liable, though the partner who bought goods on account of the firm

SECTION II.

EXTENT OF THE POWER OF A SINGLE PARTNER.

§ 114. **Foundation of the Power of a Partner.** — It is not unfrequently said that each partner is the agent of all the rest, and acts for them by possessing their authority. (*v*) It is however

(*v*) Such is almost universally the doctrine of the authorities upon the subject. Watson, the earliest writer upon the Law of Partnership, in stating the principle upon which one partner's acts bind the rest, made use of language which has been quoted with approbation by all subsequent text-writers upon the same branch of law: "It may be laid down that partners are bound by what is done by one another in the course of the partnership business. Their liability under contracts is commensurate and coextensive with their rights. Although the general rule of law is, that no one is liable upon any contract except such as are privy to it, yet this is not contravened by the liability of partners, as they may be imagined virtually present at and sanctioning the proceedings they singly enter into in the course of trade; or as each vested with a power enabling them to act at once as principals and as the authorized agents of their copartners." Watson on Part. p. 167. So in Hawken *v.* Bourne, 8 M. & W. 703, Parke, B., says: "One partner, by virtue of that relation, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has communicated to him by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged." Fox *v.* Clifton, 6 Bing. 792, per Tindal, C. J.; Walden *v.* Sherburne, 15 Johns. 422; Van Keuren *v.* Parmelee, 2 N. Y. 525; Western Stage Company *v.* Walker, 2 Ia. 512. In Winship *v.* Bank of the United States, 5 Pet. 561, Chief Justice Marshall thus declares his opinion of the basis upon which the power of one partner rests: "A partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well-conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself *a grant of power* to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and, if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust." In Greeley *v.* Wyeth, 10 N. H. 16, Parker, C. J., says: "The authority of a partner is much more extensive than that of a mere agent."

afterwards misapplied them. Johnson *v.* Barry, 95 Ill. 483; Kenney *v.* Altwater, 77 Pa. 34; Clărk *v.* Johnson, 90 Pa. 442.

Where it is a well-established custom for one firm to charge to the account of another goods furnished to a customer sent to the former by the latter, the managing partner of a firm has authority to charge it with the price of goods thus furnished to a customer sent by the managing partner to another firm to buy the goods. Cameron *v.* Blackman, 39 Mich. 108.

more exact to say that the authority of each partner rests on property quite as much as on agency, and arises from the nature and purpose of the relation of partners, and must be found and illustrated only in and by the law of partnership. This distinction is material; for some confusion and error have arisen from deriving the definition and extent of the power too exclusively from the law of agency. We take the true theory to be, that as the common law recognizes corporations, as peculiar persons, governed by a peculiar but very complete system of law, so the law-merchant, which is now a part of the common law, recognizes partnerships as *quasi* corporations. They are something between individuals and corporations, and are not governed altogether by the laws applicable to either, but by their own law. They are like individuals, in that the names of the persons composing them are to be used in court, whether they be plaintiffs or defendants. But even the usual addition, "copartners under the firm and style of," &c., indicates the point wherein a partnership resembles a corporation, in being an aggregated body with an appellation which is proper to it, which is indeed its mercantile name, under which it does all mercantile business and signs all mercantile papers. We do not say that a partnership is a person in the sense in which the common law says that a corporation is one. But we say it has a peculiar kind of personality, which must be understood and recognized if we would understand and apply aright the law of partnership. And we consider the individual partner, when conducting the affairs of the partnership, not so much as acting for himself because of his own interest, and then for the rest by their authority, but as acting for and representing this commercial personality. For it is one of the principal rules of the law which creates, defines, and governs this personality, that every one of those members who together constitute it has full power to represent it and act for it in all mercantile transactions within the scope of its business. And this power in each member is coequal with the power of every other member, excepting only such modification as may be derived from the articles of agreement which gave existence and form to this personality, or some subsequent modification of them.

§ 115. **General Extent of the Power of a Partner.** — While the power of one partner is the same with the power of every other, unless qualified by the articles, the power of every partner — all being alike — may be qualified not only by the articles, but by the nature and limitations of their transactions, or the general usage of merchants, or the especial usage of persons engaged in that

business, or even of that very firm. For out of all these sources may arise what might be called implied stipulations with each other.

Hence, this power of each partner to bind the firm is not confined to mere selling and buying, but extends over all contracts or obligations or acts fairly within the business of the firm. (*w*) Numerous and various are the questions which have arisen as to the application of this principle, as well as the cases which answer these questions.

§ 116. **Power to Borrow and Pay.** — The general principle being, then, that one partner may act for his copartnership in all trans-

(*w*) Anon., 12 Mod. 446; Smith *v.* Baily, 11 Mod. 401; ——— *v.* Layfield, 1 Salk. 292, Holt, 434; De Tastet *v.* Carroll, 1 Stark. 88; Swan *v.* Steele, 7 East, 210; Sadler *v.* Lee, 6 Beav. 324; Blair *v.* Bromley, 2 Phillips, 354; Lacy *v.* M'Neile, 4 Dow. & R. 7; Winship *v.* Bank of the United States, 5 Pet. 529, 561, 5 Mason, 176; Tapley *v.* Butterfield, 1 Met. 515; Brown *v.* Lawrence, 5 Conn. 397; Beck *v.* Martin, 2 McMullan, 260; Hawken *v.* Bourne, 8 M. & W. 703; Hill *v.* Voorhies, 22 Pa. 68. And, if a partnership engages in any transaction outside of its regular business, the acts and declarations of one partner, with respect to that transaction, bind the firm, as much as though they were made with respect to some matter in the course of its ordinary and customary business. Sandilands *v.* Marsh, 2 B. & Ald. 673. See *Ex parte* Gardom, 15 Ves. 286. So where the proprietors of several mail-coaches advertised that they would not be accountable for any parcels above the value of 5*l.*, except upon certain conditions, and A., one of the co-proprietors, who kept the coach-office, made a special agreement with the plaintiff, with respect to one coach, by which those conditions were dispensed with, it was held, that all the owners of the coaches in which A. was a partner, and by which the plaintiff's goods were sent, were bound by this special contract. Helsby *v.* Mears, 5 B. & C. 504, 8 Dow. & R. 289. See Dwight *v.* Brewster, 1 Pick. 50.

These powers of a partner exist, though some of the partners be secret or dormant. Winship *v.* Bank of the United States, 5 Pet. 529; Swan *v.* Steele, 7 East, 210; Wintle *v.* Crowther, 1 Cr. & J. 316. Though it has been held, that, if there be *actual* fraud in the original formation of the partnership, a dormant partner who has received none of the funds will not be liable to creditors upon contracts made by the ostensible partners. Mason *v.* Connell, 1 Whart. 381; Wood *v.* Connell, 2 Whart. 542. Nor does it affect the power of each partner, that the partners are trustees, and that the joint business is carried on for the benefit of their *cestuis que trustent.* Thicknesse *v.* Bromilow, 2 Cr. & J. 425. As to the effect of fraud, see Dickson *v.* Alexander, 7 Ired. 4; Emerson *v.* Harmon, 14 Me. 271; Bascom *v.* Young, 7 Mo. 1, 4; Steel *v.* Jennings, Cheves, 183; M'Kee *v.* Stroup, Rice, 291. See Halls *v.* Coe, 4 McCord, 136; Henderson *v.* Wild, 2 Camp. 561; Jones *v.* Herbert, 7 Taunt. 421; Arton *v.* Booth, 4 J. B. Moore, 192; Furnival *v.* Weston, 7 J. B. Moore, 356; Bignold *v.* Waterhouse, 1 M. & S. 255; Farrar *v.* Hutchinson, 9 A. & E. 641; Lloyd *v.* Freshfield, 2 C. & P. 325; Barker *v.* Richardson, 1 Y. & J. 362; Mountstephen *v.* Brooke, 1 Chitty, 391. In Eastman *v.* Wright, 6 Pick. 323, Morton, J., said: "In England, when a nominal plaintiff, or one of several plaintiffs, releases an action in fraud of the party in interest, the court directly interfere, and set aside the release. But in this State the courts have never exercised that power. The release may be avoided, if fraudulent; but the question of fraud can only be tried by jury." The effect of stipulations between partners upon the power of any one or more of them, when those stipulations are known to third parties, we have already considered. See *ante*, § 84. For their effect when unknown, see *post*, § 160.

actions fairly within the business of the firm, we will cite the authorities which appear to determine what acts one partner in a mercantile house may ordinarily do. We have already shown that one partner may buy and sell, and may assign and transfer, by way of either pledge or mortgage, and in trust or otherwise, in the name of the partnership. (*a*) He may also bind the firm by borrowing money, (*aa*) though he misapplies the money after borrowing it; or by lending money. (*b*) He may also make payment for the firm of the joint debts, (*bb*) and may compound them; (*c*), or he may take a release of them, which, though made to himself personally, and even though providing that those bound with him shall not be released, (*cc*) will yet be a complete discharge of the whole firm. (*d*) But a release to one partner, made with reference to a joint debt, to have the effect of discharging the firm must be a technical one under seal. (*e*) Hence a covenant with one partner not to sue him will not discharge his copartners,

(*a*) See *ante*, § 108.

(*aa*) Rothwell *v.* Humphreys, 1 Esp. 406; Thicknesse *v.* Bromilow, 2 Cr. & J. 425, 430, 431; Etheridge *v.* Binney, 9 Pick. 272; Whitaker *v.* Brown, 16 Wend. 505; Church *v.* Sparrow, 5 Wend. 223; Onondaga Co. Bank *v.* De Puy, 17 Wend. 47; Winship *v.* Bank of the United States, 5 Pet. 529, 5 Mason, 176; Lloyd *v.* Freshfield, 2 C. & P. 325; Miller *v.* Manice, 6 Hill, 119; Steel *v.* Jennings, Cheves, 183; Emerson *v.* Harmon, 14 Me. 271; Bascom *v.* Young, 7 Mo. 4; Hunt *v.* Hall, 8 Ind. 215; Hutchins *v.* Hudson, 8 Humph. 426; Hogan *v.* Reynolds, 8 Ala. 59; Saltmarsh *v.* Bower, 22 Ala. 221; [Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 818. And he may agree upon security for the loan. Hopkins *v.* Thomas, 61 Mich. 389, 28 N. W. 147.] If one partner authorizes another to procure an indorser on a note to be offered for discount, he authorizes him to mortgage all the stock in trade to secure the indorser, Patterson *v.* Maughan, 39 U. C. Q. B. 371; and, generally, such acts as may be reasonably necessary to accomplish the authorized act. Halpenny *v.* Pennock, 33 U. C. Q. B. 229.

(*b*) Alexander *v.* Barker, 2 Cr. & J. 133.

(*bb*) Innes *v.* Stephenson, 1 Moody & R. 145; Tyson *v.* Pollock, 1 Barr, 375; Cheap *v.* Cramond, 4 B. & Ald. 663; Averell *v.* Lyman, 18 Pick. 351. See Campbell *v.* Mathews, 6 Wend. 551; [Hardy *v.* Norfolk Mfg. Co., 80 Va. 403.

In Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808, the court suggested that payment of a firm debt by a single partner might be valid, even if the other objected to the payment, to the creditor's knowledge.]

(*c*) Doremus *v.* McCormick, 7 Gill, 49 65. See *Ex parte* Slater, 6 Ves. 146.

(*cc*) See Everard *v.* Herne, Litt. 191; Cocks *v.* Nash, 9 Bing. 341.

(*d*) Hammon *v.* Roll, March, 202; Nedham's Case, 8 Co. 136; Bower *v.* Twadlin, 1 Atk. 294; Co. Litt. 232, a; Collins *v.* Prosser, 1 B. & C. 682; Tuckerman *v.* Newhall, 17 Mass. 581; American Bank *v.* Doolittle, 14 Pick. 126; Wiggin *v.* Tudor, 23 Pick. 444; United States *v.* Thompson, Gilpin, 614; Burson *v.* Kincaid, 3 Pen. & W. 57; Willings *v.* Consequa, Pet. C. C. 301, 307; Brown *v.* Marsh, 7 Vt. 327; Gray *v.* Brown, 22 Ala. 262.

(*e*) Shotwell *v.* Miller, Coxe, 181; Shaw *v.* Pratt, 22 Pick. 305; Walker *v.* McCulloch, 4 Me. 421; Harrison *v.* Clare, 2 Johns. 449; Rowley *v.* Stoddard, 7 Johns. 207; De Zeug *v.* Bailey, 9 Wend. 336; Catskill Bank *v.* Messenger, 9 Cow. 37; Lunt *v.* Stevens, 24 Me. 534.

since such an agreement of itself evinces an intention on the part of the partnership creditor to avoid the effects of a technical release to one of the firm. (*f*) [1]

§ 117. **Power to receive Payment.** — One partner may also receive payment of the debts due the partnership; (*g*) he may compromise them; (*h*) or he may release them, and this even by deed.[2] But though a partner may release a joint debt in his own name only, a covenant by him personally, not to sue a debtor of the partnership, does not amount to a release of the debt, nor prevent the firm from bringing an action for it in the names of all the partners. In such case, the remedy of the partnership

(*f*) Hutton *v.* Eyre, 6 Taunt. 289; Bank of Chenango *v.* Osgood, 4 Wend. 607; Dran *v.* Newhall, 8 T. R. 168; Couch *v.* Mills, 21 Wend. 424; Chandler *v.* Herrick, 19 Johns. 129; Goodnow *v.* Smith, 18 Pick. 416; Shed *v.* Pierce, 17 Mass. 623; McLellan *v.* Cumberland Bank, 24 Me. 566; Mason *v.* Jouett, 2 Dana, 107; Hosack *v.* Rogers, 8 Paige, 229. And even a release under seal to one partner, may, it seems, be accompanied with such provisos and conditions as to confine its operation to that one partner alone, and prevent it from discharging the firm. Solly *v.* Forbes, 4 Moore, 448; 2 Br. & B. 38. See the language of Shaw, C. J., in Wiggin *v.* Tudor, 23 Pick. 444, 445.

Upon the same principle, if two are arrested on a joint *ca. sa.* for the amount of the damages obtained against them in an action of trespass, and the plaintiff discharges one of them upon his giving him his promissory note, this discharge of one operates as a release of both the defendants. Ballam *v.* Price, 2 J. B. Moore, 235. See Foster *v.* Jackson, Hob. 59. In like manner, if one of two joint debtors, who is in execution, obtains his discharge from the creditor, the debt is thereby satisfied as to the other debtor also. Clark *v.* Clement, 6 T.R. 525; Gould *v.* Gould, 4 N. H. 173; Abel *v.* Forgue, 1 Root, 502.

(*g*) Anon., 12 Mod. 447; Duff *v.* The East India Company, 15 Ves. 198; Tomlin *v.* Lawrence, 3 Moore & P. 555; M'Kee *v.* Stroup, Rose, 291; Gregg *v.* James, 1 Ill. (Breese) 107; Yandes *v.* Lefavour, 2 Blackf. 371; Allen *v.* Farrington, 2 Sneed, 526; Porter *v.* Taylor, 6 Moore & S. 156; King *v.* Smith, 4 C. & P. 108; Brasier *v.* Hudson, 9 Sim. 1. See Henderson *v.* Wild, 2 Camp. 561; Pritchard *v.* Draper, 1 Rus. & M. 191; Jacaud *v.* French, 12 East, 317.

(*h*) Pierson *v* Hooker, 3 Johns. 70; Cunningham *v.* Littlefield, 1 Edw. Ch. 104; Doremus *v.* McCormick, 7 Gill, 49, 65. [See Levick's Appeal, (Pa.) 2 Atl. 532. But he cannot accept on satisfaction shares in a company the owner of which is liable as a contributory. Niemann *v.* Niemann, 43 Ch. D. 198 (C. A.).]

[1] A release of one partner is valid and releases the firm. *Ex parte* Slater, 6 Ves. 146; Elliott *v.* Holbrook, 33 Ala. 659; Williamson *v.* McGinnis, 11 B. Mon. 74; Chase *v.* Bean, 58 N. H. 183. But a mere covenant not to sue one partner will not be effectual as a release of all. Roberts *v.* Strang, 38 Ala. 566; Hosack *v.* Rogers, 8 Paige, 229, 237. And if the intention was not to release the firm, even a sealed release of one partner will be construed as a covenant not to sue. Willis *v.* De Castro, 4 C. B. N. S. 216 (of a joint debt); Northern Co. *v.* Potter, 63 Cal. 157; Parmelee *v.* Lawrence, 44 Ill. 405; Gardner *v.* Baker, 25 Ia. 343; Greenwald *v.* Kaster, 86 Pa. 45; Williams *v.* Hitchings, 10 Lea, 326. *Supra*, note (*f*). This will be the case *a fortiori* where the release was not sealed. *Ex parte* Good, 5 Ch. D. 46; McAllester *v.* Sprague, 34 Me. 296: Burke *v.* Noble, 48 Pa. 168. *Supra*, note (*e*). See Ames, Cas. on Part., 606 *n.*

[2] See *post*, § 123.

debtor is against the covenanting partner, for the breach of covenant. (*j*)

§ 118. **Power to conduct Legal Proceedings.** — One partner has power to represent and to act for the firm in legal proceedings. Thus, one partner may, for himself and his copartner, sign a note for the weekly payment under the Lords' Act. (*k*) So, if two partners commence an action, one may release the subject-matter of it, which release will be binding upon his copartner, and operate as a bar to the action. (*l*) Upon the same principle, one partner may suspend proceedings in an action by the firm (*m*). [So in an action against the firm, one partner may enter an appearance for the rest. (*n*) It seems however, that service of process should be made on each partner personally. (*o*)]

As in legal proceedings generally, so in those under the Bankrupt Laws, the act of one partner is the act of his partnership. Thus, to sustain a fiat, one partner may make affidavit

(*j*) Walmsley *v.* Cooper, 3 Per. & D. 149.

(*k*) Meux *v.* Humphrey, 8 T. R. 25; Burton *v.* Issitt, 5 B. & Ald. 267.

(*l*) Barker *v.* Richardson, 1 Younge & J. 362; Arton *v.* Booth, 4 J. B. Moore, 192; Furnival *v.* Weston, 7 J. B. Moore, 356; Jones *v.* Herbert, 7 Taunt. 421; Wilson *v.* Mower, 5 Mass. 411. So, if a bill is drawn by a firm, and one of the partners agrees with the acceptor to provide for it when due, this operates as a release to the acceptor of any action that might have been brought upon the bill, notwithstanding any fraud on the part of the single partner as against his copartners. Richmond *v.* Heapy, 1 Stark. 202; Johnson *v.* Peck, 3 Stark. 66; Sparrow *v.* Chisman, 9 B. & C. 241.

(*m*) Harwood *v.* Edwards, cited in Gow on Part. 65. See Loring *v.* Brackett, 3 Pick. 403. Hence, if for a previous debt one partner draw a bill upon a debtor of the firm, which is accepted by him, and is taken by the partner in payment, this is giving time to the debtor, though the bill was drawn in that one partner's name alone; and the debtor cannot be sued for the amount of the debt till the bill has arrived at maturity and been dishonored. Tomlin *v.* Lawrence, 3 Moore & P. 585.

(*n*) *D. arguendo*, Harrison *v.* Jackson, 7 T. R. 208; Bennett *v.* Stickney, 17 Vt. 531; Taylor *v.* Coryell, 12 S. & R. 243, 250. See, however, *contra*, Haslet *v.* Street, 2 McCord, 310; Loomis *v.* Pierson, Harp. 470; Hills *v.* Ross, 3 Dallas, 331, note; Bright *v.* Sampson, 20 Tex. 21. A different question arises after dissolution. Hall *v.* Lanning, 91 U. S. 160, holds that one partner after dissolution has no authority to enter an appearance for the firm, in a suit against it; and a judgment founded on such an appearance is void, in case the other members resided out of the State. *A fortiori* such a judgment would be void, if the other partners could be reached by process. See *acc.* Atchison Savings Bank *v.* Templar, 26 F. R. 580.]

(*o*) Moredon *v.* Wyer, 6 M. & G. 278, and note; Demoss *v.* Brewster, 4 S. & M. 661. See Bennett *v.* Stickney, 17 Vt. 531; Phelps *v.* Brewer, 9 Cush. 390. In equity, however, where one of two partners was abroad, service of subpœna upon the other partner has been held good service upon both. Carrington *v.* Cantillon, Bunb. 107; Coles *v.* Gurney, 1 Madd. 187. And in Lansing *v.* M'Killup, 7 Cow. 416, service of declaration upon one of a firm of attorneys, whose name did not appear on the record as attorney for the defendant, the business of the firm being done in the name of the other partner, was yet held good and regular service. Alexander *v.* Stern, 41 Tex. 193. See *contra*, Young *v.* Goodson, 2 Russ. 255.

of debt, and execute the usual bond. (*p*) He may "prove a debt, vote in the choice of assignees, and sign the certificate," in behalf of the firm. (*q*) He may, by power of attorney, authorize some third person to vote in the choice of assignees, and to sign the certificate, &c., for the partnership. (*r*) He may sign a petition presented for a hearing. (*s*) And he may bind the firm in all other proceedings in bankruptcy, except in the case of a petition for a fiat, in which all the partners must join. (*t*)

§ 119. **Miscellaneous Powers of a Partner.** — One partner may also bind the firm by effecting insurances upon the joint property, though a part-owner has no such implied authority. (*u*) One partner may also, in the course of the joint business, take a guaranty, which, if so intended, shall inure to the benefit of the firm. (*v*)

[One partner may acknowledge a deed for the firm;[1] may waive demand and notice on a firm note;[2] may represent the firm at a meeting of a corporation in which the firm is a stockholder, may vote at the meeting, and may waive notice of the meeting;[3] and may sign in the name and on behalf of the firm a petition for a statutory lien.[4]]

One partner has also power to appoint an agent to transact the joint business, and to bind the partnership by his acts relative thereto. (*w*) So also, where a partnership is by name

(*p*) *Ex parte* Hodgkinson, 19 Ves. 291; 2 Rose, 174; *Ex parte* Peele, Buck, 457.

(*q*) Per Lord Eldon in *Ex parte* Hodgkinson, 19 Ves. 293; *Ex parte* Mitchell, 14 Ves. 597; *Ex parte* Shaw, 1 Glyn & J. 129; *Ex parte* Bank, 2 Glyn & J. 363; *Ex parte* Hall, 1 Rose, 2; *Ex parte* Bignold, 2 Mont. & A. 655.

(*r*) *Ex parte* Mitchell, 14 Ves. 597; *Ex parte* Shaw, 1 Glyn & J. 129.

(*s*) See *Ex parte* Morgan, Buck, 109; *Ex parte* Cox, 1 Glyn & J. 355, note; *Ex parte* Fife, 2 Mont. & A. 577.

(*t*) Buckland *v.* Newsame, 1 Taunt. 477; *Ex parte* Peele, Buck, 457; Arch. B. L. vol. 2, p. 5. See Pierce *v.* Stockwell, 11 Cush. 236.

(*u*) Hooper *v.* Lusby, 4 Camp. 66; [Hillock *v.* Traders' Ins. Co., 54 Mich. 531; Osgood *v.* Glover, 7 Daly, 367.] See Irving *v.* Excelsior Fire Ins. Co., 1 Bosw. 507; Graves *v.* Boston Marine Ins. Co., 2 Cranch, 419; Foster *v.* United States Ins. Co., 11 Pick. 85.

(*v*) Garrett *v.* Handley, 4 B. & C. 664; Walton *v.* Dodson, 3 C. & P. 162.

(*w*) Tillier *v.* Whitehead, 1 Dallas, 269; Lucas *v.* Bank of Darien, 2 Stewart, 280, 297; Coons *v.* Renick, 11 Tex. 134. See Robinson *v.* Hofman, 4 Bing. 562.

[1] Citizens' Nat. Bank *v.* Johnson, 79 Ia. 290, 44 N. W. 551; Sloan *v.* Machine Co., 70 Mo. 206.

[2] Seldner *v.* Mount Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262. But he may not waive the benefit of the exemption laws so as to bind his partner. Terrell *v.* Hurst, 76 Ala. 588; Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 10 So. 333.

[3] Keuton Furnace R. R. & M'f'g Co. *v.* McAlpin, 5 F. R. 737.

[4] Garland *v.* Hickey, 75 Wis. 178, 43 N. W. 832.

empowered to act for a third party, one partner may execute the agency so as to bind the principal. (*x*) But from a general power of attorney granted to one of two partners the other can derive no authority. (*xx*)

§ 120. **Limitation of Power by Usage.** — This principle is generally subject to the further limitations of usage, although the general usage of merchants would impose very little other restriction than that already implied by the requirement that these acts should always be within the regular business of the firm. (*y*) And if a contract be made by one partner in the name of the firm with a stranger, if the transaction is foreign to the usual course of dealing with the firm, this circumstance lays on the stranger the duty and responsibility of inquiring and ascertaining whether the partner has the authority of the firm. (*yy*)

§ 121. **Power to Submit to Arbitration.** — A seeming exception exists in relation to arbitration; for, while a copartner may create a debt, or pay a debt, or compromise a debt, or, in good faith, deal with it in any other way, the one thing which it is said he cannot so do as to bind his copartners is to submit the debt to arbitration. (*z*) Of the reasons given for this, one, that

(*x*) Gordon *v.* Buchanan, 5 Yerger, 71, 82; Beck *v.* Martin, 2 McMullan, 260; Kennebec Co. *v.* Augusta Ins. & Bank Co., 6 Gray, 204.

(*xx*) Edmiston *v.* Wright, 1 Camp. 88.

(*y*) Anon., 2 Ca. Ch. 38, 16 Vin. Ab. 242; *Ex parte* Agace, 2 Cox, 312; Livingston *v.* Roosevelt, 4 Johns. 251; Lawrence *v.* Dale, 3 Johns. Ch. 23, 17 Johns. 427; Rogers *v.* Batchelor, 12 Pet. 221; Eastman *v.* Cooper, 15 Pick. 276; Marsh *v.* Gold, 2 Pick. 285; Nichols *v.* Hughes, 2 Bailey, 109; Thomas *v.* Harding, 8 Me. 417; Walcott *v.* Canfield, 3 Conn. 198; Wagnon *v.* Clay, 1 A. K. Marsh. 257; Goode *v.* Linecurn, 1 How. (Miss.) 281; Goodman *v.* White, 25 Miss. 163. The giving of guarantees for the debts of third parties is not a part of the regular course of business of an ordinary mercantile house, and is not, therefore, within the power of one partner. See *post*, § 144. Nor is the receiving of notes for other persons, and undertaking to collect them. Hogan *v.* Reynolds, 8 Ala. 59. And, though every partner has an implied authority to borrow money generally, he is not thereby necessarily empowered to bind the firm by a loan of money for the purpose of increasing the fixed capital of the concern. Fisher *v.* Tayler, 2 Hare, 218. See Greenslade *v.* Dower, 7 B. & C. 635. A partner cannot bind his copartners, by a banking account opened by him in his own name in behalf of the firm. Alliance Bank *v.* Keaseley, L. R. 6 C. P. 433. So, notwithstanding the power of disposal which each partner possesses with respect to the joint property, he cannot give it away. *Ante*, § 90. Finally, the manner in which a particular firm has been in the habit of managing its business may greatly vary and enlarge the power which, under ordinary circumstances, that particular trade would confer upon one partner. See Woodward *v.* Winship, 12 Pick. 430.

(*yy*) Cadwallader *v.* Kroesen, 22 Md. 204.

(*z*) And this continues true, whether the submission be under seal or not. Stead *v.* Salt, 3 Bing. 101. But see Hallack *v.* March, 25 Ill. 48, and cases there cited. A firm of five members declared against the defendant for work, labor, materials, &c. The defendant pleaded the general

submission to arbitration is no mercantile transaction, and could not have entered into the minds of the partners when entering into partnership, seems to us to beg the question, and to be a very feeble reason; (*zz*) and another, that it may compel the partners, by force of the award, to do things never contemplated by them, and in no sense mercantile, seems to have little more force. (*a*) The true reason may be, that the law, while it favors arbitration in many respects and ways, on the other hand is jealous of it. The courts are, or until a very recent period (*b*)

issue, and put in an award upon the matter touching which the action had been brought. The articles containing the submission, however, were signed by only three of the partners. It was held that the submission was insufficient, and could not bind the firm. Hambidge *v.* De La Crouée, 3 C. B. 744, 745. In Adams *v.* Bankart, 1 Cr., M. & R. 685, Lord Abinger, C. B., said: "I think we have sufficient authority for saying, that one partner cannot bind another by a submission to arbitration, without the assent of the latter." Karthaus *v.* Ferrer, 1 Pet. 228; Hall *v.* Lanning, 91 U. S. 160; Martin *v.* Thrasher, 40 Vt. 460; Gibson, C. J., in Harper *v.* Fox, 7 W. & S. 143; Buchanan *v.* Curry, 19 Johns. 137; Harrington *v.* Higham, 13 Barb. 660; Buchoz *v.* Grandjean, 1 Mich. 367; Wood *v.* Shepherd, 2 Pat. & H. 442; Jones *v.* Bailey, 5 Cal. 345. See Boyd *v.* Emerson, 2 A. & E. 184; Skillings *v.* Coolidge, 14 Mass. 43, 45; Martin *v.* Thrasher, 20 Vt. 460. [Thomas *v.* Atherton, 10 Ch. D. 185 (C. A.); Fancher *v.* Bibb Furnace Co., 80 Ala. 481, 2 So. 268; Walker *v.* Bean, 34 Minn. 427, 26 N. W. 232; Tillinghast *v.* Gilmore, (R. I.) 22 Atl. 942. If authorized by the other partners, one partner may make a binding contract to submit to arbitration. Davis *v.* Berger, 54 Mich. 652, 20 N. W. 629.] Respecting the mode of showing the authority of one partner to bind his firm by a submission, Lord Abinger, C. B., said, in Adams *v.* Bankart, *supra*: "I do not mean to say that such assent must be given in any particular form of words, or that it requires to be under the hand of the copartner: all that is necessary is, that there should be some evidence of an actual authority conferred." And Parke, B., in the same case: "I am entirely of the same opinion. The authority to bind a partner to submit to arbitration does not flow from the relation of partnership; and, where it is relied upon, it must, like every authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred."

When a submission is made of all matters of difference between an individual and a partnership, it includes only such matters as are in dispute between that individual and the partnership jointly, and not those in dispute between that individual and one or more of the partners severally. Garland *v.* Noble, 1 J. B. Moore, 187.

(*zz*) Stead *v.* Salt, 3 Bing. 103; Adams *v.* Bankart, 1 Cr., M. & R. 681.

(*a*) In Boyd *v.* Emerson, 2 A. & E. 184, one question raised was, whether one partner could bind his copartners by a parol submission to arbitration. The court did not think it necessary to decide the point. The argument of counsel, however, in favor of this power in one partner is worthy of attention.

(*b*) See for cases questioning, and to some extent overruling, the ancient principle, that the courts will not enforce an agreement to refer, Scott *v.* Avery, 8 Exch. 487, 497, 5 H. L. C. 811; Livingstone *v.* Ralli, 5 E. & B. 132; Horton *v.* Soyer, 4 H. & N. 643; Russell *v.* Pellegrini, 6 E. & B. 1020. See also Cobb *v.* New England Mut. M. Ins. Co., 6 Gray, 192, 204. An English statute, 17 & 18 Vict. c. 125, § 11, provides, that when there is such an agreement, and an action is brought in violation of it, the court may grant a rule to stay proceedings, at the request of the defendants. See *post,* § 170.

have been, unwilling to enforce or sanction an agreement by which parties are compellable to renounce the perfectly impartial and well-constituted tribunal which is open to all the public, for one which the parties construct themselves, and which is open to very many possibilities of error. (*c*)

Hence both law and equity have refused to permit a partner so to bind himself and his copartners by an agreement to submit a question as to oust them of their jurisdiction. But if a partner made such a submission, and it was followed by an award, and the award and submission were honest and reasonable, and the partner thereon agreed that his firm should do the thing awarded, this might now be held, in equity at least, as obligatory on the partnership. (*d*)

Indeed, if all the partners agreed to submit a question to referees, and then refused to perform their promise, this promise, made by the whole, might not only be enforced by decree for specific performance, but it would be a good contract at law, as all such agreements to refer are, and the party refusing might be sued for his breach of promise. (*e*) And in some of our States, the power of a partner to bind the partnership, by his unsealed agreement to refer a question in which the partnership was interested, has been held as matter of law. (*f*)

§ 122. **Power to Affix a Seal.** — The contracts of a firm should be unsealed; for, on this point, the common law certainly controls the law of partnership. No partnership has a seal, and no partner can affix the seals of his copartners, or of any of them, without their express authority. While this seems to be a settled rule, there has been a great extent and some variety of adjudication in regard to it, as we show in the note. (*g*) Per-

(*c*) Harrington *v.* Higham, 13 Barb. 660.

(*d*) Buchanan *v.* Curry, 19 Johns, 137.

(*e*) So, if one member of a firm enter into a submission in behalf of himself and his partners, and undertake that the copartnership shall perform the award, the acting partner is bound; though the firm is not; and a refusal by his copartners to be bound by the arbitration will be a breach of that partner's promise, for which he may be held liable in damages. Thus, in Com. Dig. "Arbitrament" (D. 2), it is said: "If there be a controversy between A. of the one part, and B. and C. of the other, and B. submits for himself and C., and there be an award that B. shall pay; this is good, though C. be a stranger." Strangford *v.* Green, 2 Mod. 228; McBride *v.* Hagan, 1 Wend. 326, 336; Buchanan *v.* Curry, 19 Johns. 137, 143; Armstrong *v.* Robinson, 5 G. & J. 412, 422; Wood *v.* Shepherd, 2 Pat. & H. 442; Jones *v.* Bailey, 5 Cal. 345.

(*f*) Southard *v.* Steele, 3 B. Mon. 435; Taylor *v.* Coryell, 12 S. & R. 243; Wilcox *v.* Singletary, Wright, 420; [Gay *v.* Waltman, 89 Pa. 453.]

(*g*) For authorities against the power of a partner to bind his firm by a seal, see Thomason *v.* Frere, 10 East, 418; Metcalfe *v.* Rycroft, 6 M. & S. 75; Hall *v.* Bainbridge, 1 M. & G. 42; McKee *v.* Bank of Mt. Pleasant, 7 Ohio, 175; McNaughten *v.* Partridge, 11 Ohio, 223; Trimble *v.* Coons, 2 A. K. Marsh. 375; Southard *v.*

haps the old technical rule, that the authority to seal must be by seal, (*h*) would not be strictly applied; but, generally, at least authority there must be. (*i*)

Steele, 3 T. B. Mon. 435; Gerard *v.* Basse, 1 Dall. 119; Hart *v.* Withers, 1 Barr, 285; Green *v.* Beals, 2 Caines, 254; Clement *v.* Brush, 3 Johns. Cas. 180; Skinner *v.* Dayton, 19 Johns. 513; Mills *v.* Barber, 4 Day, 428; Garland *v.* Davidson, 3 Munf. 189; Tuttle *v.* Eskridge, 2 Munf. 330; Shelton *v.* Pollock, 1 Hen. & M. 422; Posey *v.* Bullitt, 1 Blackf. 99; Fisher *v.* Tucker, 1 McCord Ch. 169; Nunnely *v.* Doherty, 1 Yerg. 26; Blackburn *v.* McCallister, Peck, 371; Anon., Taylor, 113; Anon., 2 Hayw. 99; Person *v.* Carter, 3 Murphy, 321; Case of James Taylor, 1 Browne, lxxiii; Cady *v.* Shepherd, 11 Pick. 400; Van Deusen *v.* Blum, 18 Pick. 229; United States *v.* Astley, 3 Wash. C. C. 508; Fleming *v.* Dunbar, 2 Hill (S. C.), 532; Sloo *v.* State Bank of Illinois, 2 Ill. 441; Cummins *v.* Cassily, 5 B. Mon. 75; Montgomery *v.* Boone, 2 B. Mon. 244; Button *v.* Hampson, Wright, 93; Ford *v.* Haft, Wright, 118; Layton *v.* Hastings, 2 Harr. 147; Morris *v.* Jones, 4 Harr. 428; Albers *v.* Wilkinson, 6 G. & J. 358; Lucas *v.* Sanders, 1 McMullan, 311; Napier *v.* Catron, 2 Humph. 534; Smith *v.* Tupper, 4 Sm. & M. 261; Snyder *v.* May, 19 Pa. 235; County *v.* Gates, 26 Mo. 315; Gibson *v.* Warden, 14 Wall. 244; Walton *v.* Tusten, 49 Miss. 569; [Herzog *v.* Sawyer, 61 Md. 344; Moore *v.* Stevens, 60 Miss. 809; Weeks *v.* Mascoma Rake Co., 58 N. H. 101; Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314; Hull *v.* Young, 30 S. C. 121, 8 S. E. 695. The contrary seems to have been held in one *nisi prius* case, Mears *v.* Serocold, cited by Dampier, *arguendo*, in Harrison *v.* Jackson, 7 T. R. 208.] Hence custom-house bonds, signed and sealed by one partner, though in the name of and for duties on goods imported by and belonging to the partnership, are yet, at common law, not binding on the firm, but only on the executing member. Tom *v.* Goodrich, 2 Johns. 213; Walden *v.* Sherburne, 15 Johns. 409, 423; United States *v.* Astley, 3 Wash. C. C. 508. But so much practical inconvenience has been found to result from this application of the doctrine that, by act of Congress of March 1, 1823, stat. 2, chap. 21, § 25, it was provided that any bond to the United States entered into for the payment of duties by a merchant belonging to a firm, in the name of such firm, shall equally bind the partner or partners in trade of the person or persons by whom such bond shall have been executed. 3 U. S. Statutes at Large (ed. 1846), 737. [On the other hand, it seems to be held in Texas that a partner has authority in the name of the firm to sign and seal a bond to dissolve an attachment against the firm. Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. 1094.]

(*h*) See Steiglitz *v.* Egginton, Holt, 141; Berkeley *v.* Hardy, 5 B. & C. 355; Trimble *v.* Coons, 2 A. K. Marsh. 375; Cummins *v.* Cassily, 5 B. Mon. 74; Hart *v.* Withers, 1 Barr, 285; Pickering *v.* Holt, 6 Me. 160; Blood *v.* Goodrich, 9 Wend. 75, 76, 12 Wend. 525.

(*i*) It seems to be established in England (and this is also the doctrine of some early American cases), that, to bind his copartners by specialty, a partner must have a special authority under seal. The requisite authority is not conferred by a general partnership agreement under seal. Harrison *v.* Jackson, 7 T. R. 207; Steiglitz *v.* Egginton, Holt, 141; Horsley *v.* Rush, cited, *arguendo*, 7 T. R. 209. See Williams *v.* Walsby, 4 Esp. 220; Napier *v.* Catron, 2 Humph. 534. Nor does the doctrine, which is universally received as well in this country as in England, that one partner may execute a valid deed on behalf of his firm, if his copartners are present and consent thereto, constitute any exception to the general rule; for, in this case, the act of the executing partner is considered the act of all. Lovelace's Case, W. Jones, 268; Shep. Touch. 55; Fitz Abr. tit. "Feoffment," pl. 105; Com. Dig. "Fait" (A. 2); Burn *v.* Burn, 3 Ves. 578; Ludlow *v.* Simond, 2 Caines Cas. 1, 42, 55; MacKay *v.* Bloodgood, 9 Johns. 285; McWhorter *v.* McMahan, 1 Clarke Ch. 400; Halsey *v.* Whitney, 4 Mason, 232; Darst *v.* Roth, 4 Wash. C. C. 471; Anthony *v.* Butler, 13 Pet. 423, 433; Hart *v.* Withers,

§ 123. **Limitations of the Rule as to Seals.** — An important limitation to the operation of the rule occurs in proceedings in

1 Barr, 285, 291; Fichthorn *v.* Boyer, 5 Watts, 159; Overton *v.* Tozer, 7 Watts, 333; Potter *v.* McCoy, 26 Pa. 458; Flood *v.* Yandes, 1 Blackf. 102; Modisett *v.* Lindley, 2 Blackf. 120; Henderson *v.* Barbee, 6 Blackf. 28; M'Arthur *v.* Ladd, 5 Ohio, 514, 517; Pike *v.* Bason, 21 Me. 287; Fleming *v.* Dunbar, 2 Hill (S. C.), 533; Freeman *v.* Carhart, 17 Ga. 348; Lee *v.* Onstott, 1 Ark. 206, 218; Day *v.* Lafferty, 4 Ark. 450. The doctrine is the same in equity as at law. Burn *v.* Burn, *supra;* 1 Hov. Supp. 410. See Smith *v.* Winter, 4 M. & W. 454; Palmer *v.* Justice Assurance Co., 6 E. & B. 1015. While, then, in England, the common-law doctrines in reference to the execution of sealed instruments have, as far as partners are concerned, undergone but little, if any, modification, the American cases have made great and decided innovations. Thus, in most of the States, it is well established that a partnership will be bound by a deed executed by one partner on its behalf, provided the act of such partner have from his copartners either a previous parol authority or a subsequent parol ratification. The grounds of this qualification of the old rule of the common law are clearly and forcibly stated in the opinion of Mr. Chief Justice Jones, in Gram *v.* Seton, 1 Hall, 262. This opinion includes a very elaborate review of all the leading authorities upon the subject. For cases supporting the doctrine laid down in Gram *v.* Seton, see Skinner *v.* Dayton, 19 Johns. 513, 5 Johns. Ch. 351; Smith *v.* Kerr, 3 N. Y. 144; Cady *v.* Shepherd, 11 Pick. 400; Swan *v.* Stedman, 4 Met. 548; McNaughten *v.* Partridge, 11 Ohio, 223, 235; Purviance *v.* Sutherland, 2 Ohio St. 478, 486; Person *v.* Carter, 3 Murph. 321; Fleming *v.* Dunbar, 2 Hill (S. C.), 532; Lucas *v.* Sanders, 1 McMullan, 311; McCart *v.* Lewis, 2 B. Mon. 267; Darst *v.* Roth, 4 Wash. C. C. 471; Bond *v.* Aitkin, 6 W. & S. 165, overruling some earlier cases in Pennsylvania; Jackson *v.* Porter, 2 Mart. (La.) 200; Drumright *v.* Philpot, 16 Ga. 424; Price *v.* Alexander, 2 Greene (Ia.), 427; McDonald *v.* Eggleston, 26 Vt. 154; Gwinn *v.* Rooker, 24 Mo. 290; Johns *v.* Battin, 30 Pa. 84; Lowery *v.* Drew, 18 Tex. 786; [Herzog *v.* Sawyer, 61 Md. 344 (*semble*); Sterling *v.* Bock, 40 Minn. 11, 41 N. W. 236; Moore *v.* Stevens, 60 Miss. 809 (*semble*); Stroman *v.* Varn, 19 S. C. 307; Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314; Hull *v.* Young, 30 S. C. 121, 8 S. E. 695; Kasson *v.* Brocker, 47 Wis. 79, 1 N. W. 418; Rumery *v.* McCulloch, 54 Wis. 565, 12 N. W. 65.] See also Brutton *v.* Burton, 1 Chitty, 707. In Worrall *v.* Munn, 5 N. Y. 221, 240, Paige, J., regards the true rule, as derived from the cases, to be, that a prior parol authority, or a subsequent parol ratification, will make a specialty, executed by one partner in behalf of his firm, binding upon his copartners, when the act in question would have been valid if no seal had been used. In Illinois and Alabama it is held to be a presumption "warranted by common sense, by justice, and sound reason, as well as by the principles of law, that all the signers of an instrument, indicating, upon its face, an intention to seal it, adopt any seal or scrawl that may be annexed to the name of one." Davis *v.* Burton, 4 Ill. 41; Witter *v.* McNiel, 4 Ill. 433; Hatch *v.* Crawford, 2 Porter, 54; Herbert *v.* Hanrick, 16 Ala. 581. In this last case the doctrine of Gram *v.* Seton is asserted. In Tennessee, the technical rule of the common law is strictly adhered to, and no partner can bind his copartnership by affixing a seal, unless he be specially empowered, under seal, so to do. Turbeville *v.* Ryan, 1 Humph. 113; Napier *v.* Catron, 2 Humph. 534. See Lambden *v.* Sharp, 9 Humph. 224. As for the evidence of prior authority, or subsequent ratification from which a jury may infer the power of one partner to bind his copartners by deed, it has been held, that where, in a deed of dissolution executed by both partners, a debt, for which one partner had given a sealed note in the name of his firm, was put down as a debt "owing by said firm," this was an acknowledgment of the legal obligation upon the firm of the specialty from which an authority to execute it might be inferred. Fleming *v.* Dunbar, 2 Hill (S. C.), 532. So where one of two partners gave a bond

bankruptcy; (*j*) and in the case of a release to a joint debtor of a partnership claim; in both of which instances one partner may bind his firm, and without special authority. (*k*) The reason for the general rule is obvious. The seal belongs to common law and not to the law-merchant, and partnership belongs to the law-merchant and not to common law. (*l*) But

for a firm debt, in the name of the firm, and the other partner afterwards gave directions for its payment, by an order in which the bond was described as the bond of the partnership, it was held that this order was evidence of a recognition of, and an assent to, the act of the partner who executed the bond, from which his authority so to act might fairly be found by the jury. Person *v.* Carter, 3 Murph. 321. See Price *v.* Alexander, 2 Greene (Ia.), 427; Drumright *v.* Philpot, 16 Ga. 424; Bond *v.* Aitkin, 6 W. & S. 165; Tuttle *v.* Eskridge, 2 Munf. 330; Wilson *v.* Hunter, 14 Wis. 683.

(*j*) See *ante*, § 118.

(*k*) The rule applicable to a release by one partner of a joint claim has been generally stated thus: "Though one partner cannot by deed bring any fresh burden upon his copartner, he may bar him of a right which they possess jointly." One reason sometimes given for this apparent exception to the general doctrine of the common law is, that, inasmuch as a debtor may lawfully pay his debt to one partner, he ought, also, to be able to obtain a discharge upon due payment. Another reason, of a similar nature, is suggested by the above rule itself, which is, that though a release be under seal, yet its operation is not, like that of a bond or of a deed, to expose the separate persons and estates (real as well as personal) of the partners to special and dangerous liabilities. But probably the true, though technical, foundation of the rule that one partner may bind his firm by a release, under seal, of a joint claim, is, that inasmuch as such a release is certainly binding on the partner who executes it, and inasmuch as he is a necessary coplaintiff in any action by the firm for the debt released, his release necessarily operates as a bar to any joint action by the partners for the same debt. The rule is the same both in law and in equity. 2 Rol. Abr. 410 (D); Tooker's Case, 2 Co. 68; Ruddock's Case, 6 Co. 25; Perry *v.* Jackson, 4 T. R. 519; Stead *v.* Salt, 10 J. B. Moore, 393, 3 Bing. 103; D. *arguendo*, Swan *v.* Steele, 7 East, 211; per Parke, B., in Adams *v.* Bankart, 1 Cr. M. & R. 684, and in Phillips *v.* Clagett, 11 M. & W. 84, 94; Pierson *v.* Hooker, 3 Johns. 68; Bulkley *v.* Dayton, 14 Johns. 387; Morse *v.* Bellows, 7 N. H. 567; United States *v.* Astley, 3 Wash. C. C. 511; McBride *v.* Hagan, 1 Wend. 326, 337; Napier *v.* McLeod, 9 Wend. 120; Salmon *v.* Davis, 4 Binney, 375; Curtwel, *v.* Brown, 5 Jones, 263; [Allen *v.* Cheever, 61 N. H. 32; Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808.] Respecting deeds of composition, see Watson on Part. p. 225; Ellison *v.* Dezell, 1 Selw. N. P. (Am. ed.) 385. See Hawkshaw *v.* Parkins, 2 Swanst. 539, 544; Bruen *v.* Marquand, 17 Johns. 58; Halsey *v.* Whitney, 4 Mason, 206, 232; Smith *v.* Stone, 4 Gill & J. 310. As one partner may himself release a partnership claim, so he may, under seal, authorize an agent to bind the firm by the discharge of a debt due to it. Wells *v.* Evans, 20 Wend. 251, 22 Wend. 324. Where one partner duly signed and sealed a release of all actions, claims, demands, &c., but the release did not purport on its face to apply particularly either to the separate demands of that partner or to those of his firm, it not appearing that the releasee was separately indebted to the executing partner, the release was held to be a discharge of the debts due the partnership. Emerson *v.* Knower, 8 Pick. 63. And if one partner execute a deed purporting to release all the joint demands, parol evidence that a particular claim was not intended to be included is inadmissible. Pierson *v.* Hooker, 3 Johns. 68.

(*l*) Lord Kenyon says, in Harrison *v.* Jackson, 7 T. R. 210, that it would be a most alarming doctrine to hold out to the mercantile world that one partner could bind the others by deed; since it would

as there are very few mercantile transactions in which seals are needed or used: and as, if a seal was used when the instrument was equally effective without it, the courts regard the seal as surplusage only; (*m*) and as a subsequent ratification would

extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners. But the reasoning of Jones, C. J., on this point, in Gram *v.* Seton, 1 Hall, 269, seems conclusive: "Negotiable paper, by which the partner may bind the firm, equally imports a consideration with a seal; and, upon general principles, the use of the seal of the copartner, equally with the signature of the copartnership, would, if permitted, be restricted to copartnership purposes and copartnership operations solely; and the joint deed of the copartners executed by the present for the absent members, be held competent to convey or to encumber the copartnership property alone, and to have no operation upon the private funds or separate estate of the copartners. With these restrictions upon the use and operation of the seal, is not the power of a partner to bind his copartner, and to charge and encumber his estate, as great and as mischievous, without the authority to use the seal of the absent partner, as it would be with that authority?" It is to be remembered, also, that the distinction formerly taken between debts by specialty and those by simple contract — by which the former were held to be a charge upon the real estate of the debtor, while the latter were not — is now for the most part done away, at least in this country.

(*m*) This doctrine has been oftenest applied where one partner has transferred an interest, absolute or qualified, in the partnership property. Thus, a general or partial assignment for the benefit of creditors, Anderson *v.* Tompkins, 1 Brock. 462; Harrison *v.* Sterry, 5 Cranch, 289; M'Cullough *v.* Sommerville, 8 Leigh, 415; Robinson *v.* Crowder, 4 McCord, 519; Deckard *v.* Case, 5 Watts, 22; Hennessy *v.* Western Bank, 6 W. & S. 300, 310; a mortgage of personal property belonging to the firm, Tapley *v.* Butterfield, 1 Met. 515; Milton *v.* Mosher, 7 Met. 244; Sweetzer *v.* Mead, 5 Mich. 107; an assignment of a chose in action due to the firm, Everit *v.* Strong, 5 Hill, 163: these transactions have all been held valid, notwithstanding that the partner, purporting to act for his firm, has used a seal therein. It has also been held, that a delegation of power under seal by one partner to do acts which the agent would have been equally competent to do, if authorized by parol, was not invalid on account of the unnecessary solemnity of the instrument making the delegation. Lucas *v.* Bank of Darien, 2 Stewart, 280; [Boyd *v.* Thompson, (Pa.) 25 Atl. 769.] See also Price *v.* Alexander, 2 Greene (Ia.), 427, 433; Purviance *v.* Sutherland, 2 Ohio St. 478; and *contra*, Cummins *v.* Cassily, 5 B. Mon. 74, 75. Upon the same principle, the case of Brutton *v.* Burton, 1 Chitty, 707, seems to have been decided. The doctrine has been extended to executory contracts. Lawrence *v.* Taylor, 5 Hill, 107; Worrall *v.* Munn, 5 N. Y. 229. See Pike *v.* Bacon, 21 Me. 280; McWhorter *v.* McMahon, 1 Clarke Ch. 400; Ruffner *v.* McConnel, 17 Ill. 212, 216; [Sterling *v.* Bock, 40 Minn. 11, 41 N. W. 236.] See remarks of Rogers, J., in Hennessy *v.* Western Bank, 6 W. & S. 310. The limitation to the doctrine, that a transaction by one partner which would be binding on the firm without seal is not vitiated because a seal is used, is thus stated in Lucas *v.* Bank of Darien, 2 Stew. 297: "It is said that even an act which would be valid against the firm without a seal, if done by the partner or by agent under a parol appointment, would be void if executed by specialty. On this point I think a wise discrimination is required. I take the distinction to be this: that, if the bond or deed constitutes the contract, it must be made the evidence of it, and determines the remedy. Then the principle applies; because the legal effect of the contract, the form of the remedy, and the rules of evidence, are essentially different, the security being of higher dignity." And this is in accordance with the language of Marshall, C. J.,

have the effect of previous authority; and as courts of equity, and, to some extent, courts of law, place land, when it is part of the partnership property (and it is in relation to conveyances of land that the seal is most necessary, and most frequently interferes with the law of partnership), on the same footing with personal property,—the rule that a partner can affix no seal but his own and that of one who has given him authority to do so, may perhaps be considered as having now less practical importance than formerly.

§ 124. **Liability of Partner affixing Seal for Firm.**—Though one partner, by the execution for his copartners and himself of a sealed instrument, cannot bind them, yet he always binds himself. This rule is one derived from the law of agency, and regards each partner, not as standing for and representing the partnership, but as the agent of all his copartners, and consequently as always making himself liable, when, from want of sufficient authority, he fails to bind those for whom he attempts to act. (*n*)

in Anderson *v.* Tompkins, 1 Brock. 462: "No action can be sustained against the partner who has not executed the instrument on the deed of his copartner. No action can be sustained against the partner, which rests on the validity of such a deed as to the person who has not executed it." Bewley *v.* Tams, 17 Pa. 485. The doctrine of the court in Purviance *v.* Sutherland, 2 Ohio St. 478, is, that the technical rule of the common law is satisfied by holding that an agreement under seal in the name of the firm, which is executed by one partner only, is not the deed of the partnership. But such an agreement, though the deed only of the partner sealing it, may yet be evidence of a partnership liability (Fagely *v.* Bellas, 17 Pa. 67); and perhaps the form of the agreement may raise a presumption that a seal was affixed to the contract by mistake. In Kentucky, by statute, promissory notes have all the legal effect and dignity of bonds under seal. Nevertheless, "if a partner, in executing several notes for a debt, in instalments, should happen to affix a superfluous scrawl to one of them, and omit it as to the others, the first might be binding on himself alone, whilst the others would bind all the partners; and *this* would be the only legal effect of the scrawl, without which the note would have the same effect in every other respect." Per Robertson, C. J., in Montgomery *v.* Boone, 2 B. Mon. 244. See Human *v.* Cuniffe, 32 Mo. 316; Dubois's Appeal, 38 Pa. 231. But see Schmertz *v.* Shreeves, 62 Pa. 457, and Russell *v.* Annable, 109 Mass. 72.

(*n*) Elliot *v.* Davis, 2 Bos. & P. 338; Hawkshaw *v.* Parkins, 2 Swanst. 543; Trimble *v.* Coons, 2 A. K. Marsh. 375; Williams *v.* Hodgson, 2 H. & J. 474; Layton *v.* Hastings, 2 Harr. (Del.) 147; Skinner *v.* Dayton, 5 Johns. Ch. 351, 19 Johns. 513; Clement *v.* Brush, 3 Johns. Cas. 180; Gates *v.* Graham, 12 Wend. 53; Jackson *v.* Stanford, 19 Ga. 14. [Weeks *v.* Mascoma Rake Co., 58 N. H. 101.] See, however, Sellers *v.* Streator, 5 Jones, 261; also, *supra*, § 121, note (*e*). Thus, if one only of three partners execute a deed of assignment, purporting to convey all the personal property of the three to trustees, for the benefit of creditors, such a deed will pass the share of the executing partner. Bowker *v.* Burdekin, 11 M. & W. 128. See Dutton *v.* Morrison, 17 Ves. 193; Hughes *v.* Ellison, 5 Mo. 463. But if one partner executes a sealed instrument for himself and his partners, and suit is brought against all, there can be no recovery in that suit against the executing partner. Hart *v.* Withers, 1 Barr. 285.

§ 125. **Power to Confess Judgment.** — The same principles of the common law which operate to disable a partner from binding his copartners by specialty, must, it should seem, still more completely incapacitate him to bind them, without their distinct assent, by a voluntary confession of judgment. *A fortiori*, he cannot, by virtue of his implied power, authorize another to do it, [as by giving a warrant of attorney for that purpose,] even though the authority be not under seal. (*a*) But if a voluntary judgment be confessed by one partner against his firm, the judgment is binding upon that partner, and will not be set aside upon his application. Nor will it be *altogether* set aside upon the application of the other partners; but the court will amend the judgment by ordering their names to be struck out, and otherwise correcting it so that they shall not be bound, or will order execution to be served on the person and estate of the acting partner only, or that only his several interest in the partnership property shall be sold. (*b*)

So, if a partner signs and seals a deed of composition in the name and firm of himself and partner, he alone is entitled to bring covenant thereon. Metcalf *v.* Rycroft, 6 M. & S. 75. See Gates *v.* Graham, 12 Wend. 53. By contract under seal, purporting to be made between the plaintiffs and the firm of B. & T., the former agreed to erect a certain dam for the uses of the partnership. The contract was signed with the name of the partnership by B., and a seal affixed thereto. It was held that B., not having authority thus to bind his copartners, the firm were not liable on the specialty, but were liable on an implied promise for the work done, and the materials furnished by the plaintiffs to their benefit. Van Deusen *v.* Blum, 18 Pick. 229. See Sellers *v.* Streator, 5 Jones, 261; Fox *v.* Norton, 9 Mich. 207. [See on the effect of a deed sealed by one partner, Ames, Cas. on Part. 488.]

(*a*) Green *v.* Beals, 2 Caines, 254; Crane *v.* French, 1 Wend. 311; McBride *v.* Hagan, 1 Wend. 335; Grazebrook *v.* M'Creedie, 9 Wend. 437; Waring *v.* Robinson, 1 Hoff. Ch. 524; Gerard *v.* Basse, 1 Dall. 119; McKee *v.* Bank of Mt. Pleasant, 7 Ohio, 175; Remington *v.* Cummings, 5 Wis. 138; Hull *v.* Garner, 31 Miss. 145; Lagow *v.* Patterson, 1 Blackf. 252; Barlow *v.* Reno, 1 Blackf. 252; Sloo *v.* The State Bank of Illinois, 2 Ill. 428; Waring *v.* Robinson, 1 Hoff. Ch. 525; Harper *v.* Fox, 7 W. & S. 142; Bitzer *v.* Shunk, 1 W. & S. 340; Cash *v.* Tozer, 1 W. & S. 519; Overton *v.* Tozer, 7 Watts, 331; Bennett *v.* Marshall, 2 Mills, 436; Grier *v.* Hood, 25 Pa. 430; Morgan *v.* Richardson, 16 Mo. 409; Binney *v.* Le Gal, 19 Barb. 592; per Wilde, C. J., Hambidge *v.* De La Crouée, 3 C. B. 744. See Brutton *v.* Burton, 1 Chitty, 707; Kinnersley *v.* Mussen, 5 Taunt. 264; [Soper *v.* Fry, 37 Mich. 236; Ellis *v.* Ellis, 47 N. J. 69; Perth Amboy Terra-Cotta Co. *v.* Wood, 124 Pa. 367, 17 Atl. 4; McCleery *v.* Thompson, 130 Pa. 443, 18 Atl. 735. *Contra*, Wilmot *v.* The Ouachita Belle, 32 La. Ann. 607. Where a power to confess judgment need not be sealed, a partner binds his firm by giving such power. Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, even though the power is in fact sealed, since the seal may be rejected. Boyd *v.* Thompson (Pa.), 25 Atl. 769.]

(*b*) Motteux *v.* St. Aubin, 2 W. Bl. 1133; Green *v.* Beals, 2 Caines, 254; Crane *v.* French, 1 Wend. 311; St. John *v.* Holmes, 20 Wend. 609; Gerard *v.* Basse, 1 Dall. 119; Bitzer *v.* Shunk, 1 W. & S. 340; Harper *v.* Fox, 7 W. & S. 142; Morgan *v.* Richardson, 16 Mo. 409. See

§ 126. **Representations or Admissions of a Partner.** — As a partner may act for his firm by his general authority, so, as we have already seen, his representations, acknowledgments,, admissions, part payments, notice given or received, and all other doings on which rights or obligations may be founded, are binding upon the partnership: always, however, with the qualification that these things belong fairly and actually to the business of the firm; for this is a condition which universally limits his power. Thus, it was once quite uncertain what was the effect of an acknowledgment, by a partner, of a debt barred by the statute of limitations. It was held to bind the firm as long as this statute was regarded as founded on presumption of payment. Whether there had been such payment was perfectly well known to every partner, and known to each one after a dissolution as well as before. Consequently, if a partnership owed a debt, and was dissolved, and the debt ran on more than six years, and then one of the former partners acknowledged the debt, this removed the presumption of payment, and all the partners became bound. (*n*)

Grier *v.* Hood, 25 Pa. 430; Smith *v.* Tupper, 4 Sm. & M. 261; Overton *v.* Tozer, 7 Watts, 331; Cash *v.* Tozer, 1 W. & S. 519. See Sloo *v.* State Bank of Illinois, 2 Ill. 428. A, a member of a firm, confessed judgment against himself for a firm debt. It was held that the partnership property might be levied on to satisfy this judgment. Ross *v.* Howell, 84 Pa. 129.

(*n*) The different views taken at different periods by the courts of the statute of limitations are stated in all the elementary treatises upon the subject. See 3 Parsons on Contracts, 61, 67; Angell on Limitations, ch. 20 and 23. The earliest decisions of all seem to indicate that the statute was at first regarded as a statute of repose. But this view soon gave way to another, which construed the statute as one of presumption entirely; rendering it probable that the barred debt had been paid, but leaving this presumption liable to rebuttal by anything amounting to proof that the debt was in fact unsatisfied. It is true, that, to recover upon a claim against which the statute had run, there was required not only satisfactory evidence of the existence of the debt, but also a new promise. But if the continued existence of the debt was proved by the acknowledgment or admission of the debtor, or by any thing amounting thereto, then the plaintiff was not required to go further, but might rest his case upon proof of the acknowledgment or admission, and the law would imply therefrom the necessary promise. While the statute of limitations was regarded in this light, the effect of an acknowledgment by one of several joint debtors, that a joint debt barred by the statute was still unsatisfied, came before Lord Mansfield, in the case of Whitcomb *v.* Whiting, 3 Doug. 652; and it was there decided that the acknowledgment of one must be taken as the acknowledgment of all; then, all having admitted their joint indebtedness, the law raises the new promise.

As to the support which the case derives from other adjudications, it has sometimes been supposed to be inconsistent with the earlier case of Bland *v.* Haselrig, 2 Vent. 152. See Atkins *v.* Tredgold, 2 B. & C. 28, opinion of Abbott, C. J. But, besides the facts that the latter case cannot be regarded as of much authority, and can best be explained in a manner which leaves it in no way contradictory (see note in 3 Doug. 653; remarks of Best, C. J., in Perham *v.* Raynal, 2 Bing. 309; of Parker, C. J., in White *v.* Hall, 3 Pick. 293; of Story, J., in Bell *v.* Morrison, 1 Pet. 367), Whitcomb *v.* Whiting

§ 127. **Acknowledgment removing Bar of Statute of Limitations.** — But when the statute of limitations came to be looked upon, as

has been constantly acted upon as sound law in the English courts; not always, however, we think, upon precisely the same grounds. So long as the statute of limitations was regarded as one of presumption merely, Whitcomb *v.* Whiting might be, as it was, literally followed. Its doctrine was pushed to its utmost limits in Jackson *v.* Fairbank, 2 H. Bl. 340. There, one of two makers of a joint and several promissory note having become bankrupt, the payee received a dividend under the commission, on account of the note, within six years before action brought. It was held, that the payment of such dividend was such an acknowledgment of the debt as took the case out of the statute of limitations as to the other maker. This last case, and the whole doctrine of Whitcomb *v.* Whiting, were, it is true, strongly questioned in Brandrum *v.* Wharton, 1 B. & Ald. 463. So also in Atkins *v.* Tredgold, 2 B. & C. 23, where, one of two makers of a joint and several promissory note having died, it was held, that the payment of interest within six years by the other maker would not take the case out of the statute, as against the executors of the deceased promisor. But in Perham *v.* Raynal, 2 Bing. 306, where the two cases just mentioned are considered, Whitcomb *v.* Whiting was explicitly denied to be in any way impugned by them, and was expressly affirmed as good law. See Halliday *v.* Ward, 3 Camp. 32.

The cases we have just been considering were all adjudged while the statute of limitations was still regarded as a statute of presumption, Perham *v.* Raynal being decided in 1824. In little more than a year after, Court *v.* Cross, 3 Bing. 329, was adjudged in the Common Pleas, and was the first case in which a decided step was taken towards construing the statute of limitations as a statute of repose. C. J. Best, who then delivered the opinion of the court, reasserted this view of the statute in Scales *v.* Jacob, 3 Bing. 652. The position he assumed was adopted and confirmed by Lord Chief Justice Tenterden, in Turner *v.* Smart, 6 B. & C. 603; and thenceforward the statute of limitations has been invariably regarded and construed as a statute of repose. The earlier doctrine was also applied to payments of interest, made by one of the makers of a joint and several promissory note, though more than six years after it became due. They were held to take the case out of the statute, as against the other maker. Manderston *v.* Robertson, 4 Man. & Ry. 440; Channell *v.* Ditchburn, 5 M. & W. 494. But, in such case, the payment or payments must be distinctly shown to be made on account of the particular debt. Holme *v.* Green, 1 Stark. 488. So, where A. & B. made a joint and several promissory note, B. being merely a surety, a part payment by A., within six years and during the lifetime of B., was held to take the case out of the statute so as to make B.'s administrator liable on the note. Burleigh *v.* Stott, 8 B. & C. 36. See Perham *v.* Raynal, 2 Bing. 306; Wyatt *v.* Hodson, 8 Bing. 309. And where one of three joint contractors, more than six years after the contracting of the original debt, but within six years of the action brought, made a payment on account of a joint debt, but in fraud of his co-contractors, it was nevertheless held to bar the operation of the statute as against the other two. Goddard *v.* Ingram, 3 Q. B. 839. See Martin *v.* Brydges, 3 C. & P. 83. But, as we have already seen, payment of interest by one or two makers of a joint and several promissory note, after the death of the other, will not take the case out of the statute, as against the executor of the deceased maker, Atkins *v.* Tredgold, 2 B. & C. 23. See Ault *v.* Goodrich, 4 Russ. 430; Way *v.* Bassett, 5 Hare, 55; the principle being that the joint contract is determined by the death of one of the joint contractors; nor after the death of one of two joint contractors will a payment on joint account by the executor of the deceased take a debt out of the statute, as against the survivor. Slater *v.* Lawson, 1 B. & Ad. 396. See Giffin *v.* Ashby, 2 C. & K. 139. See further, in confirmation of the general principle, Rew *v.* Pettet, 1

it now is universally, as a statute of repose and not of presumption, and as resting on the principle that the courts should not

A. & E. 196; Pease *v.* Hirst, 10 B. & C.122; Clark *v.* Hooper, 10 Bing. 480; Pritchard *v.* Draper, 1 Russ. & Myl. 191.

Respecting acknowledgments or promises by words only, the question is put at rest in England by Lord Tenterden's act (9 Geo. 4, ch. 14), which, after reciting 21 Jac. 1, ch. 16, and the Irish act of 10 Car. 1, sess. 2, ch. 6, declares: "that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefits of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." But, with respect to admissions by payments, the same statute provides "that nothing therein contained shall alter, take away, or lessen the effect of any payment of any principal or interest, by any persons whatsoever." The effect of this proviso is, to leave the effect of past payment of principal or interest, by one of several joint debtors, the same as before the passage of the statute; and the reason for it is said by Chief Justice Tindal in Wyatt *v.* Hodson, 8 Bing. 312, to be, "Because the payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted; while money is not usually paid without deliberation, and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment." Chippendale *v.* Thurston, 4 C. & P. 98; 1 Moo. & M. 411; Waters *v.* Tompkins, 2 C., M. & R. 723.

The principle, then, being established in the English law, that an acknowledgment by one of several joint debtors of the existence of a joint debt will operate as a new promise by all to pay, which principle is, however, by statute limited in its application to acknowledgments by past payments, we may next inquire what is the effect in the English law of a payment by one of several partners of principal or interest on account of a partnership debt, after the firm has been dissolved. It seems to be settled in England that one partner may, after dissolution, impose a fresh charge upon his copartners, by a payment of principal or of interest, on account of an unliquidated partnership debt barred by the statute of limitations. Two reasons seem to be given for this doctrine. In the first place, partners after dissolution, being still jointly liable for the partnership debts, are still regarded as joint debtors, and therefore within the rule of Whitcomb *v.* Whiting. Furthermore, it was decided in Wood *v.* Braddick, 1 Taunt. 104, that an admission by one of two partners, after the dissolution of the partnership, concerning joint contracts made during the partnership, is competent evidence to charge the other partner. In Pritchard *v.* Draper, 1 Russ. & Myl. 191, 199, Lord Chancellor Brougham asserted the same doctrine; and it being objected that the declarations of one partner after dissolution as to a fact relating to partnership transactions, but which fact also took place after dissolution, were not admissible evidence against the other partner, he said: "The partnership, it is true, had ceased; but so, in Whitcomb *v.* Whiting, had the connection between the two makers of the promissory note. And in Goddard *v.* Ingram, 3 Q. B. 839, where one of several partners, after the dissolution of his firm and more than six years after the incurring of the original debt, but within six years of the bringing of the action, had made a part payment on account of it, which the jury found to be fraudulent upon his copartners, it was held, nevertheless, that the payment barred the operation of the statute."

Such seems to be the state of the English law upon this subject. With respect to the law of this country, as we have before said, it seems to be settled, generally, and perhaps universally, that the statute of limitations is one of repose, and not one of presumption. Whitcomb *v.* Whiting, as above explained in connection with the statute of limitations, has also been followed in many authoritative

enforce an unpaid debt, if it were old and stale, then the bar of the statute could only be removed by a new promise; that is, the old debt could not itself be demanded, but it was a good consideration for a new promise; and, if this were made, it could be enforced. But the question then is, Who makes it? And this will depend upon whether the partnership is still in existence, or has been dissolved. If it still exists, the partner making the promise has a right to make it for his copartners and himself, and it is then the promise of the whole partnership.[1] But, if the partnership be dissolved, his authority has wholly gone, and the new promise which he makes is his own only.[2] The cases are

cases, and its principle applied to all kinds of acknowledgments and admissions, except where in England its operation has been restricted by express enactment. Thus in the New England States, with the exception of New Hampshire, the doctrine of that case has been uniformly approved. Getchell *v.* Heald, 7 Me. 26; Pike *v.* Warren, 15 Me. 390; Dinsmore *v.* Dinsmore, 21 Me. 433; Shepley *v.* Waterhouse, 22 Me. 497; Martin *v.* Root, 17 Mass. 227; Cambridge *v.* Hobart, 10 Pick. 232; Ilsley *v.* Jewett, 2 Met. 168; Wheelock *v.* Doolittle, 18 Vt. 440; Joslyn *v.* Smith, 13 Vt. 353; Turner *v.* Ross, 1 R. I. 88; Bound *v.* Lathrop, 4 Conn. 336; Coit *v.* Tracy, 9 Conn. 1. So also in Virginia, Shelton *v.* Cocke, 3 Munf. 191 (see Farmers' Bank *v.* Clarke, 4 Leigh, 603); in South Carolina, in the early cases, Beitz *v.* Fuller, 1 McCord, 541; Fisher *v.* Tucker, 1 McCord, Ch. 169; which are, however, now overruled; in North Carolina, Davis *v.* Coleman, 7 Ired. 424; in Pennsylvania, Zent *v.* Heart, 8 Barr, 337, overruling prior case; in New York, in some of the early decisions, which, however, have since been overruled, see Smith *v.* Ludlow, 6 Johns. 257; Johnson *v.* Beardslee, 15 Johns. 3. The rule of Whitcomb *v.* Whiting, as in England, has also been frequently applied in this country to the case of a joint and several promissory note, made by two or more parties, but by some of them only in the character of surety. Hunt *v.* Bridgham, 2 Pick. 581; Sigourney *v.* Drury, 14 Pick. 387; Shepley *v.* Waterhouse, 22 Me. 497; Joslyn *v.* Smith, Vt. 356; Clark *v.* Sigourney, 17 Conn. 511; Caldwell *v.* Sigourney, 19 Conn. 37; Zent *v.* Heart, 8 Barr. 337. And in Fisher *v.* Tucker, 1 McCord Ch. 169, and Hathaway *v.* Haskell, 9 Pick. 42, it is held, in accordance with Atkins *v.* Tredgold, and Brandrum *v.* Wharton, *supra*, that, one of two joint debtors dying, neither the survivor nor the representatives of the deceased can, as against each other, by their acknowledgments, part payment, &c., take the debt out of the statute. See also Roosevelt *v.* Mark, 6 Johns. Ch. 266, 291, 292. [For the present state of the law on this point, see *post*, § 128, *n.* 2.]

[1] *Acknowledgment before dissolution.* — Before dissolution, an acknowledgment by one partner will bind the firm. Watson *v.* Woodman, L. R. 20 Eq. 721, 730 (*semble*. but see Goodwin *v.* Parton, 41 L. T. Rep. 91, 42 L. T. Rep. 568); Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547; Tate *v.* Clements, 16 Fla. 339; Abrahams *v.* Myers, 40 Md. 499; Faulkner *v.* Bailey, 123 Mass. 588 (*semble*); Harding *v.* Butler, 156 Mass. 34, 30 N. E. 168; Kenniston *v.* Avery, 16 N. H. 117; Tappan *v.* Kimball, 30 N. H. 136; Wood *v.* Barber, 90 N. C. 76 (*semble*); Carlton *v.* Coffin, 28 Vt. 504; Walker *v.* Wait, 50 Vt. 668.

[2] *Acknowledgment after dissolution.* — In America there is much confusion in the authorities on this point. The better view would seem to be, that after dissolution the power of a partner to bind his copartner has ceased, and an acknowledgment of a pre-

very numerous in which these questions are raised; and we endeavor to exhibit in our notes the principal authorities. It

existing firm debt, by a partial payment or a new promise, will not raise the bar of the statute against the partners who take no part in it. Bell *v.* Morrison, 1 Pet. 351; Bispham *v.* Patterson, 2 McLean, 87; Cronkhite *v.* Herrin, 15 F. R. 888; Wilson *v.* Torbert, 3 Stew. 296; Myatts *v.* Bell, 41 Ala. 222; Espy *v.* Comer, 76 Ala. 501; Curry *v.* White, 51 Cal. 530; Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547; Tate *v.* Clements, 16 Fla. 339; Kallenbach *v.* Dickinson, 100 Ill. 427; Yandes *v.* Lefavour, 2 Blackf. 371; Kirk *v.* Hiatt, 2 Ind. 322; Peirce *v.* Tobey, 5 Met. 168; Sigler *v.* Platt, 16 Mich. 206; Gates *v.* Fisk, 45 Mich. 522, 8 N. W. 558 (*semble*); Mayberry *v.* Willoughby, 5 Neb. 368; Mann *v.* Locke, 11 N. H. 246; Tappan *v.* Kimball, 30 N. H. 136; Van Keuren *v.* Parmelee, 2 N. Y. 523; Shoemaker *v.* Benedict, 11 N. Y. 176; Payne *v.* Slate, 39 Barb. 634; Graham *v.* Selover, 59 Barb. 313; Kerper *v.* Wood, 48 Oh. St. 613, 29 N. E. 501; Belote *v.* Wynne, 7 Yerg. 534; Muse *v.* Donelson, 2 Humph. 166; Folk *v.* Russell, 7 Baxt. 591; Haddock *v.* Crocheron, 32 Tex. 276; Conrad *v.* Buck, 21 W. Va. 396.

In some authorities however a distinction is made between acknowledgments made before and those made after the statutory period has run. After the statutory period has run, these authorities hold that the firm is not bound, because to hold it bound would give to a partner after dissolution the power to charge his copartner with a new debt. Merrit *v.* Pollys, 16 B. Mon. 355; Ellicott *v.* Nichols, 7 Gill, 85; Newman *v.* McComas, 43 Md. 70; Whitney *v.* Reese, 11 Minn. 138; Steele *v.* Jennings, 1 McMull. 297. But if the acknowledgment is made by a partner before the statute has run, though after dissolution it binds all the partners. Burr *v.* Williams, 20 Ark. 171; Austin *v.* Bostwick, 9 Conn. 496; Bissell *v.* Adams, 35 Conn. 299; Beardsley *v.* Hall, 36 Conn. 270; Brewster *v.* Hardeman, Dudley (Ga.), 138; Tillinghast *v.* Nourse, 14 Ga. 641; Parker *v.* Moore, 2 La. Ann. 1017; Carroll *v.* Gayarré, 15 La. Ann. 671; Greenleaf *v.* Quincy, 12 Me. 11; Schindel *v.* Gates, 46 Md. 604; White *v.* Hale, 3 Pick. 291; McClurg *v.* Howard, 45 Mo. 365; Merritt *v.* Day, 38 N. J. 32; Casebolt *v.* Ackerman, 46 N. J. 169.

In a few jurisdictions it has been held that even if made after the statute has run, an acknowledgment by one partner after dissolution binds all the partners. McIntire *v.* Oliver, 2 Hawks, 209; Willis *v.* Hill, 2 Dev. & B. 231; Walton *v.* Robinson, 5 Ire. 341 (nullified by statute; Wood *v.* Barber, 90 N. C. 76); Turner *v.* Ross, 1 R. I. 88 (*semble*); Beitz *v.* Fuller, 1 McC. 541; Veale *v.* Hassan, 3 McC. 278; Wheelock *v.* Doolittle, 18 Vt. 440; Carlton *v.* Ludlow Woolen Mill, 28 Vt. 504; Mix *v.* Shattuck, 50 Vt. 421; Shelton *v.* Cocke, 3 Munf. 191; Brockenbrough *v.* Hackley, 6 Call, 51.

In Pennsylvania, it is held that an acknowledgment by the *liquidating* partner will remove the bar of the statute. Houser *v.* Irvine, 3 W. & S. 345; Campbell *v.* Floyd, (Pa.), 25 Atl. 1033. But when the acknowledgment is by any other than the liquidating partner, it does not affect copartners. Levy *v.* Cadet, 17 S. & R. 126; Coleman *v.* Fobes, 22 Pa. 156; Reppert *v.* Colvin, 48 Pa. 248; Wilson *v.* Waugh, 101 Pa. 233; Kauffman *v.* Fisher, 3 Grant, 302.

If however the creditor had no notice of the dissolution the acknowledgment by one partner binds all. Sage *v.* Ensign, 2 All. 245; Buxton *v.* Edwards, 134 Mass. 567; Kenniston *v.* Avery, 16 N. H. 117; Tappan *v.* Kimball, 30 N. H. 136; Clement *v.* Clement, 69 Wis. 599, 35 N. W. 17.

An individual promise by one partner to pay the debt does not remove the bar of the statute against the firm. Ford *v.* Clark, 72 Ga. 760; Stewart's Appeal, 105 Pa. 307.

It is to be added that, in a number of the States (and the number is increasing), statutes similar to 9 Geo. 4, ch. 14, have rendered the acknowledgment of one joint contractor insufficient to take any case out of the statute of limitations as to his co-contractors. Generally, as in the English statute, though not uniformly, an excep-

will be seen that in these cases, not only the general question of the authority of the partner is considered, but the particular questions which occur when the new promise is made, if at all, not only by an acknowledgment, but, in the absence of this, by part payment of the principal or of the interest.

§ 128. **Admissions after Dissolution.** — A similar principle determines all the questions raised by the acts of one partner. If the partnership has ceased, his authority has gone, unless he derives it from his power to settle the estate as surviving partner, or in some other especial manner. That is, he can no longer make a new promise, which shall be their promise as well as his. But it does not follow that his admissions and acknowledgments, as those of one well acquainted with the facts, especially if they are against his interest, should not be received as determining a question, not of future promise, but of a past fact. We cannot but think, however, that the true principle which should decide this much-vexed question, must be this: After a dissolution, however caused, the new words and acts of those who were partners shall have no effect upon the rights or obligations of their former copartners, excepting so far as these words and acts fairly belong to the settlement of the concern, and the power which each partner has in winding it up.[1]

tion is made of an acknowledgment by part payment. See Mass. Pub. Stat. ch. 197, § 17; Williams *v.* Gridley, 9 Met. 482; Maine Rev. Stat. ch. 146, § 27; Sibley *v.* Lambert, 30 Me. 253; Vt. Gen. St. ch. 63, §§ 23, 28; Carlton *v.* Ludlow Woolen Mill, 27 Vt. 496; Caldwell *v.* Lawrence, 20 Ga. 94; Foute *v.* Bacon, 24 Miss. 156; Briscoe *v.* Anketell, 28 Miss. 361; Webster *v.* Stearns, 44 N. H. 498; Griswold *v.* Haven, 25 N. Y. 595. Such a statute has been passed in Michigan. Gates *v.* Fisk, 45 Mich. 522, 8 N. W. 558. A debt may become barred, by the statute of limitations, as to one member of a partnership in the State, and not as to those out of the State. Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150.

Of course, any partner who authorizes or ratifies the acknowledgment is bound by it. Wilson *v.* Waugh, 101 Pa. 233.

This question has been held to be governed by *lex fori*; consequently an acknowledgment made by a partner in a jurisdiction where it is held to bind the firm will not affect the limitation in another jurisdiction where it is held not to bind the firm. Kerper *v.* Wood, 48 Oh. St. 613, 29 N. E. 501.

See a very valuable note upon this subject, Ames, Cas. Part. 618.

[1] *Admissions after dissolution.* — The authorities upon this point are in hopeless conflict. One line of decisions follows the case of Wood *v.* Braddick, 1 Taunt. 104. This was an action brought to recover from the defendant the proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale in America, as the plaintiffs alleged, to the defendant, jointly with one Cox, who was then his partner, but, as the defendant contended, to Cox only. The defendant pleaded the general issue, and the statute of limitations. At the trial at Guildhall, before Mansfield, C. J., the plaintiffs produced in evidence a letter from Cox, dated the 24th of June, 1804, stating a balance of 919*l.* to be then due to the bankrupts upon this consignment. It was in proof that on the 30th of July, 1802, Braddick & Cox dissolved their partner-

§ 129. **Admissions before Dissolution.** — If the partnership exists, the question then is, Do the act or the words refer to the business

ship, as from the 17th of November, 1800. Cockell & Lens, Sergeants, objected, that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge Braddick. The Chief Justice overruled the objection, but reserved the point; and the jury, being of opinion that the agency was undertaken by Cox on the partnership account, found a verdict for the plaintiff. Mansfield, C. J.: "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation; but the power of partners, with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it, that, from the moment when it is dissolved, his account of their joint contracts should cease to be evidence; and that those who are to-day as one person in interest should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?"

Heath, J.: "Is it not a very clear proposition, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue."

The principle of Wood *v.* Braddick is affirmed in Pritchard *v.* Draper, 1 Russ. & M. 191, where it was held, that the declaration of one of two partners, that, subsequently to dissolution, a debt due to the partnership had been paid, was admissible as evidence against the other partner. See Goddard *v.* Ingram, 3 Q. B. 839; Lacy *v.* M'Neile, 4 Dow. & R. 7, 9. See also Parker *v.* Morrell, 2 C. & K. 599, where it was held, that the answer in chancery of one who had been a partner in a firm, but who had retired from the firm and ceased to have any interest in it before the commencement of the suit, is not admissible in evidence against the continuing partners of the firm, although it relates to transactions which occurred with the firm at the time when the retired partner was a member of it. The doctrine of Wood *v.* Braddick is maintained in many American cases. Reimsdyk *v.* Kane, 1 Gall. 630, 636 (*semble*); Austin *v.* Bostwick, 9 Conn. 496; Taylor *v.* Hillyer, 3 Blackf. 433 (*semble*); Kirk *v.* Hiatt, 2 Ind. 322; Parker *v.* Merrill, 6 Me. 41; Cady *v.* Shepherd, 11 Pick. 400; Bridge *v.* Gray, 14 Pick. 55; Vinal *v.* Burrill, 16 Pick. 401; Gay *v.* Bowen, 8 Met. 100; Ide *v.* Ingraham, 5 Gray, 106; Buxton *v* Edwards, 134 Mass. 567; Pennoyer *v.* David, 8 Mich. 407; Mann *v.* Locke, 11 N. H. 246; Rich *v.* Flanders, 39 N. H. 304; Merritt *v.* Day, 38 N. J. 32; McElroy *v.* Ludlum, 32 N. J. Eq. 828 (but see Flanagin *v.* Champion, 1 Green Ch. 51); Myers *v.* Standart, 11 Oh. St. 29; Feigley *v.* Whitaker, 22 Oh. St. 606; Fripp *v.* Williams, 14 S. C. 502 (see the earlier cases, Simpson *v.* Geddes, 2 Bay, 533; Kendrick *v.* Campbell, 1 Bail. 522; Meggett *v.* Finney, 4 Strobh. 220); Woodworth *v.* Downer, 13 Vt. 522; Loomis *v.* Loomis, 26 Vt. 198; Garland *v.* Agee, 7 Leigh, 362.

In opposition to this view of the power of one partner after dissolution, it is held by weighty authorities in this country, that, when a partnership ceases to exist, the power of each partner wholly ceases also; so that, unless he have special authority, his acts, declarations, &c., even when they relate to past partnership transactions, are utterly inadmissible as against his firm. Judge Story, who takes this view, says it seems difficult upon principle to perceive how the acts, declarations, &c., of one partner after dissolution can be binding upon his partnership "any more than the declarations, or acts, or acknowledgments of any other agent of the partnership would be, after his agency had ceased. In the latter case, they are constantly held inadmissible by the courts of common law, upon grounds which seem absolutely irresistible." Story on Part. § 323. Bell *v.* Morrison, 1 Pet. 351, 373 (*semble*); Thompson *v.* Bowman, 6 Wall. 316; Bispham *v.* Patterson, 2 McLean, 87; Barringer *v.* Sneed, 3 Stew. 201; Demott *v.* Swaim, 5 Stew. & P. 293; Burns *v.* McKenzie, 23 Cal. 101; Miller *v.*

of the partnership? If so, it binds the firm. (*q*) Thus, an admission, by one partner (the partnership or joint liability having been proved or admitted), of a fact bearing on the issne of a case at bar, is admissible evidence. (*r*) The partnership being

(*q*) Thus Abbott, C. J., in Sandilands *v.* Marsh, 2 B. & Ald. 678: "But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners." Rapp *v.* Latham, 2 B. & Ald. 795, 801; Lacy *v.* M'Neile, 4 Dow. & R. 7. See also —— *v.* Layfield, 1 Salk. 292, and French *v.* Rowe, 15 Iowa, 563.

(*r*) The declarations of one partner are of course, as a general rule, admissible in evidence, only when they are admissions, and are supposed to have been made against the interests of the party and of his firm. Independently of statutes, they are competent to charge, but not to exonerate, the partnership. Hence, in a suit against A. & B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged. Young *v.* Smith, 25 Mo. 341; Clark *v.* Huffaker, 26 Mo. 264. See Danforth *v.* Corter, 4 Ia. 230.

[So where the defendant had a claim against two members of a firm, and they represented themselves as the only partners; the defendant, having dealt with the firm, could not on account of the representation set off against his debt to the firm the debt owed to him by the two partners. Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665.]

But before one partner's acknowledgments can thus be admitted to affect others as copartners, a joint liability must be shown. A *prima facie* case of partnership, at least, must be made out. Nicholls *v.* Dowding, 1 Stark. 81; Gray *v.* Hodson, 1 Esp. 135; Grant *v.* Jackson, Peake, 203; Neimerick, 19 Ill. 172; Winslow *v.* Newlan, 45 Ill. 145; Walker *v.* Duberry, 1 A. K. Marsh. 189; Craig *v.* Alverson, 6 J. J. Marsh. 609; Bentley *v.* White, 3 B. Mon. 263; Daniel *v.* Nelson, 10 B. Mon. 316; Hamilton *v.* Summers, 12 B. Mon. 11; Lambeth *v.* Vawter, 6 Rob. (La.) 127; Conery *v.* Hays, 19 La. Ann. 325; Owings *v.* Low, 5 Gill & J. 134; National Bank of Commerce *v.* Meader, 40 Minn. 325, 41 N. W. 1043; Maxey *v.* Strong, 53 Miss. 280 (but see Curry *v.* Kurtz, 33 Miss. 24); Brady *v.* Hill, 1 Mo. 315; Pope *v.* Risley, 23 Mo. 185; Dowzelot *v.* Rawlings, 58 Mo. 75; Hackley *v.* Patrick, 3 Johns. 536; Walden *v.* Sherburne, 15 Johns. 409; Hopkins *v.* Banks, 7 Cow. 650; Gleason *v.* Clark, 9 Cow. 57; Baker *v.* Stackpoole, 9 Cow. 420; Mercer *v.* Sayer, Anth. N. P. 162; Van Keuren *v.* Parmelee, 2 N. Y. 523, 530; Nichols *v.* White, 85 N. Y. 531; Bank of Vergennes *v.* Cameron, 7 Barb. 143; Tassey *v.* Church, 4 W. & S. 141; Hogg *v.* Orgill, 34 Pa. 344; Crumless *v.* Sturgess, 6 Heisk. 190; Hawkins *v.* Lee, 8 Lea, 42; Rootes *v.* Wellford, 4 Munf. 215. After a partner has ceased to have any interest in the firm, his declarations charging the firm cannot be received against his copartner; being really in his own interest, not against it. So the admission of a partner after a discharge in bankruptcy cannot be used against a firm. Parker *v.* Morrell, 2 Ph. 453, 2 C. & K. 599; Grant *v.* Jackson, Peake N. P. 203. But, if a partner has not received his certificate of discharge, his admission will bind his copartners, though made after his bankruptcy. Grant *v.* Jackson, Peake, 203. See Boyce *v.* Watson, 3 J. J. Marsh. 498; Howard *v.* Cobb, 3 Day, 309; Martin *v.* Root, 17 Mass. 227. Nor can the admission of a partner after he has assigned all his interest in the firm be received to charge the firm. Jeffries *v.* Castleman, 75 Ala. 262; Gilligan *v.* Tebbetts, 33 Me. 360; Hatheway's Appeal, 52 Mich. 112. Whether the fact that the declarations were made to one who had no notice of dissolution would affect the question is not clear. It is held in New York that it would not. Brisban *v.* Boyd, 4 Paige, 17; Williams *v.* Manning, 41 How. Pr. 454; Pringle *v.* Leverich, 97 N. Y. 181. But the opposite opinion has been held. Spears *v* Toland, 1 A. K. Marsh. 203; Myers *v.* Standart, 11 Oh. St. 29.

proved *aliunde*, entries of account made by one partner during the existence of the firm are admissible evidence to charge all. (*t*) So notice or knowledge of any one partner is notice or knowledge affecting all the rest, or rather the partnership as a whole; (*u*) and such notice, even if coupled with a demand, as

Reimsdyk *v.* Kane, 1 Gall. 635; Teller *v.* Muir, 2 Pennington, 548; Robbins *v.* Willard, 6 Pick. 464; Corps *v.* Robinson, 2 Wash. C. C. 388; Harris *v.* Wilson, 7 Wend. 57; Bucknam *v.* Barnam, 15 Conn. 67; Bispham *v.* Patterson, 2 McLean, 88; Flanagin *v.* Champion, 1 Green, Ch. 51; Grafton Bank *v.* Moore, 13 N. H. 99; Dutton *v.* Woodman, 9 Cush. 255; Alcott *v.* Strong, 9 Cush. 323. And admissions by a party that he is a partner with others bind himself only. They are not competent evidence of partnership to all. *Ante*, § 78.

(*t*) Walden *v.* Sherburne, 15 Johns. 409. See Champlin *v.* Tilley, 3 Day, 307; Noyes *v.* Brumaux, 3 Yeates, 30. [Bryce *v.* Joynt, 63 Cal. 375.] So, if two partners are garnishees, and one answers for both and acknowledges a joint indebtedness, judgment may be entered against the firm. Anderson *v.* Wanzer, 5 How. (Miss.) 587. See, further, in illustration of the general rule, Vicary's Case, Bac. Abr. tit. "Evidence," 623; Hodenpyl *v.* Vingerhold, Chitty on Bills, 489, note; Cheap *v.* Cramond, 4 B. & Ald. 663; Lucas *v.* De la Cour, 1 M. & S. 249; Lacy *v.* M'Neile, 4 Dow. & R. 7; Rex *v.* Inhabitants of Hardwick, 11 East, 578, 589; Nicholls *v.* Dowding, 1 Stark. 81; Odiorne *v.* Maxcy, 13 Mass. 182, 15 Mass. 44; Bridge *v.* Gray, 14 Pick. 61; Bound *v.* Lathrop, 4 Conn. 336; Fisk *v.* Copeland, 1 Over. 383; Reimsdyk *v.* Kane, 1 Gall. 635; Williams *v.* Hodgson, 2 H. & J. 474; Hart *v.* Palmer, 12 Wend. 523; Cook *v.* Castner, 9 Cush. 266; Fickett *v.* Swift, 41 Me. 65; Foil *v.* McArthur, 31 Ala. 26; Smitha *v.* Cureton, 31 Ala. 652; Kahn *v.* Boltz, 39 Ala. 66. It makes no difference, as to the binding force of the declarations of any one partner, that some of the firm are dormant, Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15, 25; see Lea *v.* Guice, 13 Sm. & M. 656; Corps *v.* Robinson, 2 Wash. C. C. 388; Allen *v.* Owens, 2 Speers, 170; nor that the partner making admissions or acknowledgments respecting joint affairs is not a party to the suit in which they are offered as evidence, see McCutchin *v.* Bankston, 2 Ga. 244, 247; Thwaites *v.* Richardson, Peake, 16. But if a partnership is established between co-defendants, and the admissions of one are offered in evidence to charge all, the copartners may show that such admissions relate to other than the partnership concerns, Jaggers *v.* Binnings, 1 Stark. 64; or to transactions antecedent to the partnership, Cutt *v.* Howard, 3 Stark. 3; or that they were made by mistake, Ridgway *v.* Philip, 1 Cr. M. & R. 415. And if a partner make a purchase, apparently for himself, not mentioning his firm, and afterwards declare that he made the purchase for the use of the partnership, such declaration, by itself, is not admissible to charge the firm for the price of the thing purchased, on the ground of interest in the party making it. White *v.* Gibson, 11 Ired. 283.

(*u*) As in the case of notice by or to one partner in legal proceedings. If one of several, jointly interested in a cargo, effects an insurance for the benefit of all, he may give notice of abandonment for all. Hunt *v.* Royal Exchange Ass. Co., 5 M. & S. 47. As one partner may bind his firm by giving notice, so he may by receiving it, always supposing the transaction to be *bona fide*. Lord Ellenborough, C. J., in Bignold *v.* Waterhouse, 1 M. & S. 259; Alderson *v.* Pope, 1 Camp. 404, n.; *Ex parte* Waithman, 2 Mont. & A. 364. Thus if several joint defendants, makers of a promissory note, suffer judgment by default, service of a rule *nisi*, to compute the principal and interest due on the note, made upon one, is service on all; for *quoad hoc* they are partners. Figgins *v.* Ward, 2 Cr. & M. 424; Carter *v.* Southall, 3 M. & W. 128. See further Mayhew *v.* Eames, 1 C. & P. 550; Lansing *v.* M'Killup, 7 Cow. 416; Powell *v.* Waters, 8 Cow. 670; Gilly *v.* Singleton, 3 Litt. 249; Fitch *v.* Stamps, 6 How. (Miss.) 487; Hayward

a notice to quit certain premises, (*v*) or a demand on which trover is to be founded, (*w*) may be given or made by one partner on his general authority. Almost the whole law on this subject resolves itself into the rule, that the representations or misrepresentations of a partner are binding on the firm, provided they are made in the course of, and relate to, and are material to, the transaction of the business of the firm.[1]

§ 130. **Power to vary Business of Partnership.** — From the same principle, that the power of each partner grows out of the business of the firm, and is measured by it, another rule is drawn, namely, that the business of a partnership is not to be materially varied, except by consent of the other partners. It cannot be changed as to its object and character, nor materially enlarged beyond its originally intended scope; nor can a new branch of business be taken up and added to the old. For the very first thing for a

v. Harmon, 17 Ill. 477; Miser *v* Trovinger, 7 Ohio St. 281. In like manner, notice to one of two or more partners of a prior unrecorded deed is notice to all the partners, and will render void a subsequent deed of the same land to all the partners. Barney *v.* Currier, 1 D. Chip. 315. See Watson *v.* Wells, 5 Conn. 468. If a bill accepted by a firm is dishonored by one partner, notice of the dishonor need not be given to the other partners, and, if the drawer of a bill be a partner in the house upon which it is drawn, proof of notice to the drawer of the dishonor is not necessary. Porthouse *v.* Parker, 1 Camp. 82; Gowan *v.* Jackson, 20 Johns. 176; Bouldin *v.* Page, 24 Mo. 595. Farther, if a note indorsed by a firm becomes due after its dissolution, notice of dishonor given to one of the late partners will be sufficient, if the holder has not been notified of the dissolution. Nott *v.* Downing, 6 La. 684. See Darling *v.* March, 22 Me. 189, 190. And notice to the surviving partner of the dishonor of a note indorsed by the firm is sufficient to bind the estate of the deceased partner, though the holder knew of the death of the deceased partner before the note became due. Dabney *v.* Stidger, 4 Sm. & M. 749. See Cocke *v.* Bank of Tennessee, 6 Humph. 51. But persons who are joint indorsers of a note or bill, but are not partners, must be severally notified of its dishonor; and, without notice to both, it seems that neither can be holden. Shepard *v.* Hawley, 1 Conn. 368; Bank of Chenango *v.* Root, 4 Cow. 126; Dabney *v.* Stidger, *supra.* See 1 Pars. Notes and Bills, 502; *post,* § 146, *ante,* § 101.

(*v*) Doe d Eliot *v.* Halme, 2 Man. & R. 433. Otherwise, if the joint lessees are not partners. Goodtitle *v.* Woodward, 3 B & Ald. 689.

(*w*) See *ante*; § 105 and note.

[1] Upon this proposition see, in addition to the authorities quoted, Wood *v.* Braddick, 1 Taunt. 104; Weed *v.* Kellogg, 6 McLean, 44; Munson *v.* Wickwire, 21 Conn. 513; Wiley *v.* Griswold, 41 Ia. 375; Dupierris *v.* Hallisay, 27 La. Ann. 132; Harryman *v.* Roberts, 52 Md. 64; Smith *v.* Collins, 115 Mass. 388; Coleman *v.* Pearce, 26 Minn. 123, 1 N. W. 846; Cady *v.* Kyle, 47 Mo. 346; Ruckman *v.* Decker, 23 N. J. Eq. 283; McKee *v.* Hamilton, 33 Oh. St. 7; Irby *v.* Brigham, 9 Humph. 750; Western Assur. Co. *v.* Towle, 65 Wis. 247. The representations must be in the usual course of business. Boor *v.* Lowrey, 103 Ind. 468. And where one partner declared that certain property belonged to his copartner individually this did not deprive the firm of the property; and one who in reliance on the declaration bought it at a sheriff's sale as property of the partner could not hold it as against the firm. Williams *v.* Lewis, 115 Ind. 45, 17 N E. 262.

partnership to do is to determine what business it shall transact; that must be the determination of all, and remains in force until changed by all. (*x*) At the same time there may be an apparent exception to this rule in relation to third parties. If a partner enter into a new branch of business in the name of the firm, but without the authority of the firm, and this is unprofitable, the firm — if they have in no way adopted or ratified the transactions — may refuse to participate in the loss, and cast the whole on that partner, treating it as his several business. And any third party dealing with that partner, and knowing, or having sufficient means of knowing, that he goes beyond the business of the firm and transcends his rights, can look only to him; for the firm may then repudiate this new business as well to this third person as to the partner. (*y*) But it may happen that this new business

(*x*) The leading, and perhaps the only case directly bearing upon the proposition of the text is that of Natusch *v.* Irving, cited in the Appendix to Gow on Part. p. 398. There a large number of persons had united in forming a joint-stock company, for the purpose of effecting fire and life assurances. The plaintiff, a shareholder in the company, on behalf of himself and the other shareholders, filed a bill in equity against the president and directors of said company; praying, amongst other things, that they might be restrained from employing the capital, credit, &c., of the said company in the business of marine insurances. Lord Chancellor Eldon, in giving his opinion upon the facts, put the following case: "If six persons join in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners; and such one or more of the other partners could be clearly shown to have *acquiesced* in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners, so engaged, in difficulties and embarrassments, unless they were permitted to proceed in the farther execution of such projects, — if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction." These principles being applicable as well to a partnership of six hundred as to one of six, his lordship said that "the court would restrain particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them." It was further considered that an offer to return to the plaintiff in this suit his capital with interest; or to indemnify him against losses from transactions outside the specified purposes of the institution, or the fact that the plaintiff could sell his shares for more than he gave for them, — that any or all these circumstances, did not affect his right to hold his associates to the original business of the partnership and to prevent them by injunction from transgressing its reasonable limits. See Kean *v.* Johnson, 1 Stock. 401.

(*y*) See *ante*, § 85, to the point that

has nothing in itself to distinguish it from the general business of the firm, and that the third person had no notice that it was so distinguished; then he will hold the firm, and on the same ground on which he would be unaffected by any private stipulation or limitations of the firm not made known to him. (*z*) [1]

SECTION III.

POWER OF ONE PARTNER TO ISSUE NEGOTIABLE PAPER.

§ 131. **Power to issue Negotiable Paper.** — The whole doctrine of negotiable paper, so far as it differs from the common law of contracts, is derived from the law-merchant. The law of partnership, as we have seen, has no other source. And when they meet, as in the powers of partners to make, indorse, receive, or otherwise deal with negotiable paper, for the partnership, we have a twofold reason for solving the question which this topic presents, by the law-merchant, as that has been established by adjudication, or by that usage of merchants which is the foundation of the law-merchant. It was established, as long ago as the reign of William III., that, "by the custom of England, when there are two joint traders, and one accepts a bill drawn on both, for him and partner, it binds both, if it concerns the trade." (*a*) The same doctrine has also been always applied both to the making and to the indorsement of bills of exchange and promissory notes, as well in law as in equity.[2] "In drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest." (*b*)

the nature of the particular business of a firm is generally notice to the world of the limitations thereby put upon the power of each partner; and, consequently, that persons dealing with a partner in matters beyond the scope of that particular business cannot charge the partnership thereon, without proof of that partner's special authority. Guillou *v.* Peterson, 9 Phila. 225. A partnership is not bound by the acts of another partnership having a common member, unless it authorizes or ratifies such acts. Cobb *v.* Illinois Central R. R. Co., 38 Iowa, 601.

(*z*) See Barnley *v.* Rice, 18 Tex. 481.

(*a*) Pinkney *v.* Hall, 1 Salk. 126, 1 Ld. Raym. 175.

(*b*) Lord Kenyon, in Harrison *v.* Jack-

[1] Defendant sold the good-will of a certain business to plaintiff, and agreed not to engage directly or indirectly in the same business for twenty years. Defendant then formed a copartnership with a third party for carrying on a business within the general scope of which the forbidden business lay. Defendant's partner, without the knowledge of defendant, entered upon the forbidden business on behalf of the firm. It was held that defendant's contract was broken. Congdon *v.* Morgan, 13 S. C. 190.

[2] One partner who makes a note in the course of business binds the firm. Wagner

§ 132. **Authority to use Firm Name presumed.** — The power of each partner to put the name of the firm to negotiable paper is so universally implied from the very existence of the partnership, that stipulations among the partners that one or more of them shall not have this right will not affect third parties, unless made known to them; and this is true whether all the partners be known or whether some be unknown and dormant. (*c*) Nor is it

son, 7 T. R. 207. See Anon., Styles, 370; Smith *v.* Jarves, 2 Ld. Raym. 1484; Lane *v.* Williams, 2 Vern. 277; Smith *v.* Baily, 11 Mod. 401; Buller N. P. 270; Sutton *v.* Gregory, 2 Peake, 150; Arden *v.* Sharpe, 2 Esp. 525; Swan *v.* Steele, 7 East, 210; Ridley *v.* Taylor, 13 East, 175; Livingston *v.* Roosevelt, 4 Johns. 265; Smith *v.* Lusher, 5 Cow. 689; Manhattan Company *v.* Ledyard, 1 Caines, 191; Kane *v.* Scofield, 2 Caines, 368; McGowan *v.* Bank of Kentucky, 5 Litt. 271; Commercial Bank of Manchester *v.* Lewis, 13 Sm. & M. 226; Crozier *v.* Kirker, 4 Tex. 252. On the other hand, if there are several drawees or payees of a bill or note, who are not partners, an acceptance or indorsement by one of them will not be the act of all, nor bind all. See Carvick *v.* Vickery, Doug., 653, n., Holt. 297, March, 64, 1 Beawes, 445.

(*c*) Hubert *v.* Nelson, Davies' B. L. 8; Winship *v.* Bank of the United States, 5 Pet. 529, 5 Mason, 176; South Carolina Bank *v.* Case, 8 B. & C. 427; Grant *v.*

v. Simmons, 61 Ala. 143; Palmer *v.* Scott, 68 Ala. 380; Silverman *v.* Chase, 90 Ill. 37; Moffitt *v.* Roche, 92 Ind. 96; Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640; Fuller *v.* Percival, 126 Mass. 381; Wilson *v.* Richards, 28 Minn. 337; Mace *v.* Heath, 30 Neb. 620, 46 N. W. 918; Wagner *v.* Freschl, 56 N. H. 495; Steuben County Bank *v.* Alberger, 101 N. Y. 202; Moorehead *v.* Gilmore, 77 Pa. 118; Morse *v.* Hagenah, 68 Wis. 603, 32 N. W. 634. It is therefore no defence to a firm note to show that the holder knew that one partner signed it without consent of the other, provided it was really or ostensibly given for firm purposes. Moffitt *v.* Roche, 92 Ind. 96. A partner who has authority to make a note of course has authority to alter it. Mace *v.* Heath, 30 Neb. 620, 46 N. W. 918.

Power after dissolution. — After dissolution, whether brought about by death or otherwise, a partner has no power to bind the firm by giving a firm note, even for a pre-existing firm debt, or in renewal of an old firm note. Rose *v.* Gunn, 79 Ala. 411; Bank of Montreal *v.* Page, 98 Ill. 109; Hayden *v.* Cretcher, 75 Ind. 108; Dunlap *v.* Limes, 49 Ia. 177; Meyer *v.* Atkins, 29 La. Ann. 586; Matteson *v.* Nathanson, 38 Mich. 377; Jenness *v.* Carleton, 40 Mich. 343; Citizens' Mutual Ins. Co. *v.* Ligon, 59 Miss. 305; Mauney *v.* Coit, 80 N. C. 300; Palmer *v.* Dodge, 4 Oh. St. 21; Gardner *v.* Conn, 34 Oh. St. 187; McCleery *v.* Thompson, 130 Pa. 443, 18 Atl. 735; Brown *v.* Chancellor, 61 Tex. 437; Conrad *v.* Buck, 21 W. Va. 396.

Nor can a partner after dissolution bind the firm by indorsing negotiable paper in the name of the firm. Stair *v.* Richardson, 108 Ind. 429, 9 N. E. 300; Carleton *v.* Jenness, 42 Mich. 110, 3 N. W. 284.

But the use of the firm name is binding if the other partners authorize or ratify the act. Sanborn *v.* Stark, 31 F. R. 18; Murray *v.* Ayer, 16 R. I. 665, 19 Atl. 241. Or if the use of the firm name was required by a firm contract made before dissolution. Star Wagon Co. *v.* Swezey, 52 Ia. 391, 3 N. W. 421.

The peculiar rule prevails in Pennsylvania that a liquidating partner may bind the firm by giving a note for money borrowed to pay firm debts. Fulton *v.* Central Bank, 92 Pa. 112; Siegfried *v.* Ludwig, 102 Pa. 547.

A settling partner after dissolution may sign the firm name to a check upon the bank account of the firm, for the purpose of paying the firm debts. Bradford *v.* Taylor, 61 Tex. 508. So of a surviving partner. Backhouse *v.* Charlton, 8 Ch. D. 444 (C. A.).

incumbent upon persons dealing with a partner to inquire whether he is authorized to sign the partnership name to commercial paper. In the absence of facts to the contrary, they have a right to presume that he has this power. (*d*) It is always open to the partners to show that negotiable paper bearing their name was never their paper, or not signed with their name in and for their business, or, if their paper, that it was not transferred on their account; and if this be so, and the third party claiming of them had no belief, grounded on sufficient circumstances, that it was their paper, then they are not held. It has already been remarked that an individual is held liable as a partner because he was so in fact, or because he was held out as one. An exactly analogous rule applies to negotiable paper bearing the name of a firm: it binds the firm either if it was their paper negotiated in their business, or if it was "held out" as such; that is, so treated and dealt with by the firm, or with their knowledge and without their objection, as to justify others in believing it to be their paper, and the making or transfer of it their transaction. (*b*)

Hawkes, Chitty on Bills, 42; Bank of Kentucky *v.* Brooking, 2 Litt. 41; Walden *v.* Sherburne, 15 Johns. 409, 413; Whitaker *v.* Brown, 16 Wend. 505; Bank of Rochester *v.* Monteath, 1 Denio, 402; [Rocky Mountain Nat. Bank *v.* McCaskill, 16 Col. 408, 26 Pac. 821; Stimson *v.* Whitney, 130 Mass. 591.]

(*d*) Coursey *v.* Baker, 7 Harris & J. 28; Storer *v.* Hinkley, Kirby, 147; Champion *v.* Munford, Kirby, 172; Hawes *v.* Dunton, 1 Bailey, 146; Drake *v.* Elwyn, 1 Caines, 184; Vallett *v.* Parker, 6 Wend. 615; Porter *v.* Cumings, 7 Wend. 172; Foster *v.* Andrews, 2 Pen. & W. 160; LeRoy *v.* Johnson, 2 Pet. 186, 197. Nor, with respect to this implied power of each partner, is there any difference between general and special partnerships. Livingston *v.* Roosevelt, 4 Johns. 251. See Davidson *v.* Robertson, 3 Dow, 229; Williams *v.* Thomas, 6 Esp. 18. There are partnerships, however, which are not strictly *trading* partnerships, and in the course of whose business the use of negotiable paper is generally neither customary nor necessary. Partners in such firms have not *prima facie* or implied authority to bind them by putting the firm name upon bills or notes. Of this sort are professional partnerships, and those for mining and farming purposes. See *ante*, § 85. But the mere circumstance that the business of a firm consists in making profits out of real estate, as in working a stone quarry, will not take the case out of the general rule. Thicknesse *v.* Bromilow, 2 Cr. & J. 425, 430.

The act of drawing a bill of exchange by one partner, in his own name, upon the firm of which he is a member, for the use of the partnership concern, has been held to be an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as on an accepted bill. Dougal *v.* Cowles, 5 Day, 511. See also Beach *v.* State Bank, 2 Ind. 488; Miller *v.* Thompson, 3 M. & G. 576. And it seems that in such case, if the partnership were *not* held to be bound at law, yet, if the bill were actually drawn on partnership account, equity would enforce payment of it. Reimsdyk *v.* Kane, 1 Gall. 630. See, as to the subject of this note generally, 1 Pars. Notes and Bills, 123–148. A partner may indorse a note, of which his firm is payee, in the name of his firm, to himself; and may then, in his own name, sue and recover from the maker. Kirby *v.* Cogswell, 1 Caines, 505; Burnham *v.* Whittier, 5 N. H. 334.

(*b*) We have just seen that it is within

§ 133. **Issue of Negotiable Paper in Fraud of Firm.** — The making or indorsement of a promissory note, in the name of the firm, by one of the firm, does not bind the firm, if the payee or indorsee knows, or ought from the circumstances to know, that it is on private account, or unless specially authorized or ratified by the other partners; (*ba*) but the firm will be held if the thing is done apparently in the course of business, and the other party has no privity with the fraud and no notice or knowledge of it. But a party cannot, as to his copartners, waive notice upon a note indorsed by him for his own benefit. (*bb*)

the general implied power of each partner to bind his firm by all contracts concerning negotiable paper. As against his copartners, the making, accepting, or indorsing of such paper by one partner is valid only when the act is within the scope of the joint business and is *actually on the joint account*. But, as far as third parties are concerned, such act of a single partner charges the partnership, if only it fairly *appear* to be within the joint business and on the joint account. Hence, wherever the partnership name is signed by a partner to negotiable paper the firm is bound, unless in some way the title of the holder can be impeached. Wintle *v.* Crowther, 1 Cr. & J. 316, 318; Lane *v.* Williams, 2 Vern. 277; Baker *v.* Charlton, 1 Peake, 80; Arden *v.* Sharpe, 2 Esp. 523; M'Nair *v.* Fleming, 1 Montagu on Part. 37; 3 Dow, 229; 2 Bell Comm. 672; Lloyd *v.* Ashby, 2 B. & Ad. 23; Vere *v.* Ashby, 10 B. & C. 288; Livingston *v.* Roosevelt, 4 Johns. 251; Winship *v.* Bank of the United States, 5 Pet. 529; Etheridge *v.* Binney, 9 Pick. 272, 274; Miller *v.* Manice, 6 Hill, 114. [Schwanck *v.* Davis, 25 Neb. 196, 41 N. W. 141.] And it has been held that the fact that the payee of a note, made by one partner in the name of the firm, believed that the money for which the note was given was to be applied to the individual purposes of the acting partner, would not invalidate the note as to the firm, unless such misappropriation really took place. Hamilton *v.* Summers, 12 B. Mon. 11. Nor, if a partner has borrowed money on his own credit, and given his separate note therefor, is it a fraud afterwards to substitute the note of the firm, provided the money borrowed actually came to the use of the firm. Neither, if the original loan was made on the credit of the firm, though the separate note of the borrowing partner was executed for it, would it be a fraud to substitute for the separate security the note of the firm, notwithstanding it did not appear that the money went into the business of the partnership. Union Bank *v.* Eaton, 5 Humph. 499. See Ala. Coal Mining Co. *v.* Brainard, 35 Ala. 476; Connecticut River Bank *v.* French, 6 Allen, 313; Fielden *v.* Lahens, 9 Bosw. 436; Stephens *v.* Reynolds, 2 Fost. & Fin. 147; Dow *v.* Phillips, 24 Ill. 249, Maynard *v.* Fellows, 43 N. H. 255.

(*ba*) Ditts *v.* Lonsdale, 49 Ind. 529; Reubin *v.* Cohen, 48 Cal. 545; First Nat. Bank *v.* Breese, 39 Iowa, 640; Hotchkiss *v.* English, 4 Hun, 369, 6 Th. & C. 658; Tompkins *v.* Woodford, 5 W. Va. 216; Graves *v.* Kellenberger, 51 Ind. 66; Lime Rock Ins. Co. *v.* Treat, 58 Me. 415; Zuel *v.* Bowen, 78 Ill. 234; Bankhead *v.* Alloway, 6 Cold. (Tenn.) 56; Blodgett *v.* Weed, 119 Mass. 217; Crocker *v.* Colwell, 46 N. Y. 212; [Campbell *v.* Pence, 118 Ind. 313, 20 N. E. 840; Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325.] A firm is not bound for capital contributed by any partner, even if a firm note be given therefor, if the note be given without the authority of the other partners. Wiltram *v.* Van Wormer, 44 Ill. 97; Heap *v.* Dobson, 15 C. B. N. S. 460. Baxter *v.* Plunkett, 4 Houst. (Del.) 450.

(*bb*) Windham County Bank *v.* Kendall, 7 R. I. 77. See Bush *v.* Crawford (U. S. C. Ct.), 9 Phila. 392, where it is held that nothing short of *bad faith* of the plaintiff

§ 134. **The Burden of Proof. — Rule in America.** — The question has been very much discussed, on whom lies the burden of proof; and we have already alluded to it, in connection with the question to whom credit is given. There is some fluctuation in the adjudication both of England and of this country; but we think there is no material difference in the principles adopted by the two countries. It must be regarded as the general presumption of law, that all paper upon which the signature of the firm has been put by a partner, is the paper and bears the signature of the partnership; and that all transfers of such paper by him were lawful. (c)

can be available as a defence to such a note. See also, to same point, Canadian Bank *v.* Wilson, 36 U. C. Q. B. 9. And if the person receiving such a note indorses the same before maturity to a *bona fide* holder, for value, he is liable in damages to the defrauded partners. Calkins *v.* Smith, 48 N. Y. 614. Nor is it a defence to a note given to a partnership, that one of the partners agreed that it might be paid by off-setting a debt due from the partner so agreeing. Harper *v.* Wrigley, 48 Ga. 493. See also Stearns *v.* Houghton, 38 Vt. 583.

Where one partner, holding notes for the benefit of the firm, attempts to pawn or pledge them for his own private debts, the court will interfere to restrain it as an act of fraud on his copartners. Stockdale *v.* Ullery, 37 Pa. 486. Moreover, the title of the holder is not affected by any knowledge acquired by him subsequently to his reception of the paper. In Swan *v.* Steele, 7 East, 210, see the very instructive opinion of Lord Ellenborough, C. J. We shall find this same principle occurring and being applied to nearly all the questions which we are about to consider respecting the liability of a firm upon negotiable paper issued or transferred by one partner. See *post*, § 137, respecting cases where paper bearing the firm name, but originally made or afterwards transferred in fraud of the firm, has come into the hands of a *bona fide* holder for value.

(c) Manuf. & Mech. Bank *v.* Winship, 5 Pick. 11; Etheridge *v.* Binney, 9 Pick. 274; Waldo Bank *v.* Greely, 16 Me. 419; Barrett *v.* Swann, 17 Me. 180; Vallett *v.* Parker, 6 Wend. 615; Doty *v.* Bates, 11 Johns. 544; Knapp *v.* McBride, 7 Ala. 19; Ensminger *v.* Marvin, 5 Blackf. 210; Miller *v.* Hines, 15 Ga. 197; Thurston *v.* Lloyd, 4 Md. 283; Manning *v.* Hays, 6 Md. 5; Powell *v.* Messer, 18 Tex. 401; Hickman *v.* Kunkle, 27 Mo. 401; Carrier *v.* Cameron, 31 Mich. 373; [Rocky Mountain Nat. Bank *v.* McCaskill, 16 Col. 408, 26 Pac. 821; Sherwood *v.* Snow, 46 Ia. 481; Deitz *v.* Regnier, 27 Kas. 94; Lindh *v.* Crowley, 29 Kas. 756; First Nat. Bank *v.* Morgan, 73 N. Y. 593; Hogg *v.* Orgill, 34 Pa. 344.] If a creditor of a partnership take a bill from his debtors, drawn by them upon another firm, and this bill is afterwards, in the usual course of business, accepted in the name of the firm drawn upon, though by a partner who is also a member of the drawing firm, it cannot, in such a case, be inferred as matter of law from this latter fact, standing alone, that the purpose of the parties, or even that the effect of the transaction, is to subject the funds of the acceptors to the payment of the debt. These facts alone appearing, the acceptance is, *prima facie*, an acceptance on the joint account of the accepting firm, and binds a partner therein who is not a member of the drawing firm, and did not expressly assent to it. Tutt *v.* Addams, 24 Mo. 186. See Phinsen *v.* Negley, 25 Pa. 297. Nor is the fact that a draft or bill, made in the name of the firm, is made payable to the order of one of the partners, any indication that the paper was not drawn on partnership account, and in the usual course of the business of the firm. Nor is the presumption that a draft or bill, so signed, is regular partnership paper, changed by showing that such paper was discounted at the request of the partner who drew the draft in the name of the

This, therefore, would call on the partnership to discharge itself, and therefore would lay the burden of proof on them.

Thus far the law seems to be clear. Then the American adjudication very decidedly assumes that the third party taking this paper, with the knowledge that it was given for the private and personal debt only of one partner, knows enough to put him on his guard, and that he is now bound to inquire whether the firm authorized this use of their name, and can only hold them on the ground that they did so authorize it in fact; and this he must show as the foundation of his claim. In other words, the American courts hold the doctrine that a third party taking from a partner the signature of his firm for his own debt, cannot hold that firm, without proof of authority, adoption, or ratification by the firm. (*d*)

firm whose name was inserted as payee, who indorsed it, and drew out the proceeds. Haldeman *v.* Bank of Middletown, 28 Pa. 440; Phinsen *v.* Negley, 25 Pa. 297. See Pierce *v.* Jackson, 21 Cal. 636; Uhler *v.* Browning, 4 Dutch. 79; Hurd *v.* Haggerty, 24 Ill. 171; Littell *v.* Fitch, 11 Mich. 525.

A., the indorser of a promissory note made by B., one member of a firm consisting of B. & C., payable to the order of A., who indorsed it to C., A.'s indorsement being for the accommodation of the firm, may maintain an action against B. & C. jointly, to recover the amount which he, A., may have been compelled to pay. Thayer *v.* Smith, 116 Mass. 363.

(*d*) Chazournes *v.* Edwards, 3 Pick. 5; Homer *v.* Wood, 11 Cush. 62; Davenport *v.* Runlett, 3 N. H. 386; Williams *v.* Gilchrist, 11 N. H. 535; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Livingston *v.* Roosevelt, 4 Johns. 251; Laverty *v.* Burr, 1 Wend. 529; Wardell *v.* Hughes, 3 Wend. 418; Whitaker *v.* Brown, 11 Wend. 75; Gansevoort *v.* Williams, 14 Wend. 133; Joyce *v.* Williams, 14 Wend. 141; Wilson *v.* Williams, 14 Wend. 146; Baird *v.* Cochran, 4 S. & R. 397; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Abpt *v.* Miller, 5 Jones, 32; Weed *v.* Richardson, 2 Dev. & B. 535; Hagar *v.* Mounts, 3 Blackf. 261; Taylor *v.* Hillyer, 3 Blackf. 433; Hickman *v.* Rieneking, 6 Blackf. 387; Rogers *v.* Batchelor, 12 Pet. 221; Mauldin *v.* Branch Bank at Mobile, 2 Ala. 502; Darling *v.* March, 22 Me. 184; Brown *v.* Duncanson, 4 H. & McH. 350; Poindexter *v.* Waddy, 6 Munf. 418; Robertson *v.* Mills, 2 H. & G. 98; Stearns *v.* Burnham, 4 Me. 84; Elliott *v.* Dudley, 19 Barb. 326; Lanier *v.* McCabe, 2 Fla. 32; Tutt *v.* Addams, 24 Mo. 186; Powell *v.* Messer, 18 Tex. 401; Clay *v.* Cottrell, 18 Pa. 408. The fact that a note given by one partner, in the name of his firm, but mainly for his own debt, includes within it a small debt of the firm, will not make the firm liable on the note. King *v.* Faber, 22 Pa. 21. And wherever the firm name is put by one partner upon negotiable paper under circumstances which make the transaction actually or constructively fraudulent, and therefore void as to the firm, the bill or note, also, is void in the hands of the fraudulent holder as to any of the other parties to it; for, otherwise, the partnership would eventually be made liable upon it. Ridley *v.* Taylor, 13 East, 175; Livingston *v.* Hastie, 2 Caines, 246; Chazournes *v.* Edwards, 3 Pick. 5; Williams *v.* Walbridge, 3 Wend. 415; Hagar *v.* Mounts, 3 Blackf. 261. But see Bowen *v.* Mead, 1 Mich. 432. As to the question of the consent of the firm to the act of one partner, by which he pledges the partnership name for his private debt, it is not a matter of legal presumption, but a matter of fact, of which the jury must be satisfactorily convinced. Hence, where the jury were instructed that, if one of two partners was present and heard the other partner make an arrangement by which the partnership name was pledged in a

§ 135. **Rule in England.** — The weight of authority in the English courts seems to be in favor of rules substantially similar. (*e*) That is, they also hold, that, if a creditor of one partner

matter outside of the partnership concerns, the law would presume that the former assented to it, it was held, that such instruction was ground for a new trial. Mercein *v.* Andrus, 10 Wend. 261; Foster *v.* Andrews, 2 Pen. & W. 160 ; Jones *v.* Booth, 10 Vt. 268 ; McKinney *v.* Brights, 16 Pa. 399. But where a partner gives the partnership name for his individual debt, the assent of his copartners to the act, or their ratification of it, may be implied from circumstances, and need not be proved by express agreement. Gansevoort *v.* Williams, 14 Wend. 133 ; Noble *v.* M'Clintock, 2 W. & S. 152 ; Chazournes *v.* Edwards, 3 Pick. 11 ; Cotton *v.* Evans, 1 Dev. & B. Eq. 284 ; Abpt *v.* Miller, 5 Jones, 32 ; Brewster *v.* Mott, 5 Ill. 378 ; Powell *v.* Messer, 18 Tex. 401 ; Kemegs *v.* Richards, 11 Barb. 312 ; Wheeler *v.* Rice, 8 Cush. 205. See Elliott *v.* Dudley, 19 Barb. 326. Nor need there be any new and independent consideration for the act of the partners, ratifying and promising to be bound by the act of a copartner who has wrongfully used the partnership name for his own benefit. Commercial Bank *v.* Warren, 15 N. Y. 577. In Flagg *v.* Upham, 10 Pick. 147, it appeared that Valentine, one of two partners, had given the firm note for his several debt ; and that afterwards his copartner, acting under a mistake of law, acknowledged himself liable upon the note, and gave his written guaranty for its payment. The payee bringing his action upon the guaranty, the court said : "The note was made in the partnership name, purported to bind both partners, and was binding upon the partners, if made with their consent. Supposing it to be made by Valentine for his several debt, without the consent of the defendant, it would not, indeed, be binding upon him ; but no one else could make the objection, and it depended on himself to insist on, or to waive, the objection. Under these circumstances, knowing the terms of the partnership between Valentine and himself, and knowing the consideration for which the note was given, we are of opinion that his acknowledgment of his own liability, and his express obligation to guarantee the payment, were a waiver of any objection which he might have made to the note, and therefore that this guarantee was given upon a good consideration, and that he is bound by it." See Stearns *v.* Burnham, 4 Me. 84 ; Leverson *v.* Lane, 13 C. B. N. S. 278. In Taylor *v.* Hillyer, 3 Blackf. 433, where one of two partners had given a note, in the name of his firm, for his private debt, and this was known to the payee, a subsequent oral promise by the other partner to pay the note was deemed to be within the statute of frauds, and therefore not binding on him. See Mercein *v.* Andrus, 10 Wend. 461 ; Fielden *v.* Lahens, 9 Bosw. 436 ; Whitmore *v.* Adams, 17 Iowa, 567 ; Burleigh *v.* Parton, 21 Tex. 585.

(*e*) The English and American rules on this point have frequently been contrasted in the courts of this country. The views taken of the points of difference between the two, though variously stated, are in the main in unison with those of the text. Thus in Chazournes *v.* Edwards, 3 Pick. 5, Parker, C. J., after stating the American rule, says : "The only case which has a contrary tendency is that of Ridley *v.* Taylor, 13 East, 175, in which case, however, the principle above stated is admitted ; but it was thought that the facts did not show that knowledge on the part of the creditor which would constitute the transaction fraudulent on his part. There were circumstances in the case from which it was thought the plaintiffs might reasonably infer that the bill given to them by their debtor was one which he had a right within his general authority as a partner to transfer. Though the decision does not seem to be in exact conformity with the rule as before settled in several cases, yet the principle is clearly admitted." In Dob *v.* Halsey, 16 Johns. 38, Spencer J., thus expresses the distinction : "The only difference between the decision of this court and that of the

take partnership paper in payment of his debt from that partner, and there are no further facts in the case, the partnership would not be held, and the act of the holder of that paper would be deemed fraudulent in law. (*f*) But, if further facts

King's Bench consists in this: We require the separate creditor, who has obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound. The rule of the King's Bench throws the burden of avoiding such security on the firm, by requiring them to prove, that the act was covinous on the part of the partner for whose private debt the paper of the firm was given, by showing that it was done without the knowledge, and against the consent, of the other partners, and that the fact was known to the separate creditor when he took the paper of the firm." See Laverty *v.* Burr, 1 Wend. 529, 531, opinion of Sutherland, J. The opinion of Nelson, J., in Gansevoort *v.* Williams, 14 Wend. 133, upon the same point, is very full and elaborate. He says: "The English cases upon this subject are not always consistent with themselves; and even the same court, while they profess to adhere to this general position, namely, that the partner denying the authority of his associate must prove affirmatively that the holder knew the paper was given in a transaction unconnected with the partnership, and also that he did not assent, sometimes substantially disregard the latter qualification of the rule in the application of it to facts." He illustrates the above remarks by a citation of some of the leading English authorities, from the examination of which he concludes "that while the English courts hold to the position that the firm is liable on a bill or note made by one out of the partnership business, unless the holder knows that it was so made, and that the other partners did not concur, the frequent practical operation and effect of it under their direction does not essentially differ from the rules as settled in this court. They undoubtedly put the defence of the copartner upon the ground of fraud, committed upon him by his associate and the holder; but this is sometimes inferred from the fact that the bill or note is given for a private debt, and that known to the holder; and at other times further proof is required negativing a presumed concurrence of the copartner." See opinion of Bronson, J., in Wilson *v.* Williams, 14 Wend. 146, 158; of Tracy, Senator, in State *v.* Catskill Bank, 18 Wend. 480; Rogers *v.* Batchelor, 12 Pet. 221; Bank of Tennessee *v.* Saffarans, 3 Humph. 597.

(*f*) This is the principle of Hope *v.* Cust, cited by Lawrence, J., in 1 East, 52. The same principle was applied in Shirreff *v.* Wilks, 1 East, 48, the case in which Hope *v.* Cust, *supra*, was cited. Lord Kenyon, C. J., said: "This is an action brought against three persons, Wilks, Bishop, and Robson, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by Bishop alone, in the name of the firm. The consideration for this bill was some porter, which had been sold by the plaintiffs to Wilks & Bishop only, at a time when Robson had no concern with the house. Then the plaintiffs, knowing this, draw the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, Robson, had no concern with the matter, and was no debtor of theirs, — no assent of his being found, and nothing stated to show that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs, therefore, ought not in justice to have taken this security, by which they were to bind one who was not their debtor: the transaction is fraudulent upon the face of it." So in Green *v.* Drakin, 2 Stark. 347. There H. and B. being partners, the plaintiff lent H. 500*l*, to enable him to enter into partnership with D., the defendant, and shortly after D. H. and B. became partners. To pay part of the sum borrowed, H. drew a bill of exchange in the partnership name, to his own order, and endorsed the same to

come in, these do not seem to be construed with the same severity, in reference to the holder, as they would be in this country. Thus, if the paper be larger than the debt, and not agreeing with it in point of time, and is indorsed before the holder sees it, such facts have been considered as warranting the conclusion that the holder honestly believed, and might rationally have believed, that the firm authorized the transfer. (*g*) But, while it is true that

the plaintiff. Being called as a witness, he testified that he had drawn the bill in question without the knowledge of his copartners, but that the plaintiff did not know this. The defendant had given no notice of his intention to dispute the consideration of the bill. But Lord Ellenborough was of opinion that the nature of the transaction was intrinsically notice, and he directed, that the plaintiff should be nonsuited, on the ground that one partner had no right to bind another without his knowledge, by drawing a bill for his own private debt. *Ex parte* Goulding, 2 Glyn & J. 118. See Jones *v.* Yates, 9 B. & C. 532; *Ex parte* Thorpe, 3 Mont. & A. 716; *Ex parte* Bonbonus, 8 Ves. 540; *Ex parte* Peele, 6 Ves. 604; May *v.* Chapman, 16 M. & W. 355; Smith *v.* Coleman, 7 Jur. 1053. In Franklin *v.* M'Gusty, 1 Knapp, 301, the Master of the Rolls said: "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners." And see Blinn *v.* Evans, 24 Ill. 317.

(*g*) The principal case is Ridley *v.* Taylor, 13 East, 175. The plaintiffs in November, 1806, sold to Ewbank, of the firm of Ord & Ewbank, linen-drapers, on his separate account, a cargo of coals, to the amount of 34*l.* 11*s.* In May following, Ewbank paid 5*l.* on account, and gave his note for the balance. This note was dishonored, and taken up by the plaintiffs, who shortly after received from Ewbank, for the same balance, the bill in suit. This bill, for 40*l.*, was drawn and indorsed by Ewbank in the style and firm of Ord & Ewbank, and was before that time accepted by the defendant Taylor. After delivering this acceptance to the plaintiffs, Ewbank applied to the plaintiffs for the balance of 9*l.* 19*s.* 9*d.*; but the plaintiffs refused to pay it until the bill upon the defendant should have been paid. The plaintiffs negotiated the bill for 40*l.*, but were subsequently obliged to pay it, and thereupon debited Ewbank alone for the amount. Ord & Ewbank having become bankrupt, the defendant was sued as acceptor, and a verdict found for the plaintiffs to the amount of the bill, subject to the opinion of the court on the above facts. It was held, in the King's Bench, that the verdict should stand to the amount of Ewbank's debt.

The same circumstances, of the partnership paper being for an amount larger than the private debt, and of its being drawn, accepted, and indorsed before the creditor saw it, and of its differing in point of time, seem to have determined the opinion of the court in *Ex parte* Kirby, 1 Buck, 511. There T., M., and F. were in partnership, under the firm of M., F., & Co. T. also carried on business on his own account, and being separately indebted to K. to the amount of 100*l.*, he sent to K. a bill of exchange for 300*l.* already drawn and accepted, and also indorsed by M., F., & Co., the payees, but which wanted nearly three months of being due. At the same time, T. requested K. to place 100*l.* to his credit, and to send him a bill for the balance, 200*l.* K. accordingly sent a draft for 200*l.*, which was duly paid. The bill for 300*l.* being dishonored, and M., F., & Co. having become bankrupt, K. was held to have made a *bona fide* exchange of security, and to be entitled to prove against the joint estate, though not against the separate estate of T.

Upon the same principle, apparently, it was held, in *Ex parte* Bonbonus, 8 Ves. 540, that the mere fact that money advanced to one partner upon the security of the firm was carried to his separate account, even with the knowledge of the

paper agreeing in amount and time with the debt, and therefore more obviously made for the debt, would be more suspicious, we

lender, was not sufficient to make the transaction fraudulent as to the other copartners, and thereby to discharge the firm from liability. Lord Eldon said: "This petition is presented upon a principle which it is very difficult to maintain, that if a partner, for his own accommodation, pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money that it is upon the separate account, and so, that it is against good faith that he should pledge the partnership, then they should show that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold, that a man borrowing money upon a bill of exchange, pledging the partnership, without any knowledge in the banker that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted whether Hope *v.* Cust was not carried too far, yet that does not reach this transaction; nor Shirreff *v.* Wilks, as to which I agree with Lord Kenyon, that, as partners, whether they expressly provide against it in their articles (as they generally do, though unnecessarily) or not, do not act with good faith when pledging the partnership property for the debt of the individual, so it is a fraud in the person taking that pledge for his separate debt." Further, it has been held both here and in England, that if one partner, to pay his separate debt, give the partnership acceptance to an amount greater than the debt, the creditor may, in an action against the firm, recover the difference between the amount of the bill and his separate demand; the whole transaction, it seems, not being vitiated by the fraud as to part. Thus, in Wintle *v.* Crowther, 1 Cr. & J. 316, the defendants, Crowther & Combes, were sued as the acceptors of two bills of exchange, — one for 130*l.* 10*s.* 6*d.*, the other for 45*l.* 10*s.* Respecting the former bill, these facts were in evidence: Crowther & Combes carried on business in partnership as coal merchants, Combes being a dormant partner. Crowther was also engaged in another kind of business on his separate account, and therein became separately indebted to the plaintiffs for 80*l.* The plaintiffs drew on him two bills of exchange; the one for 40*l.*, the other for 38*l.* 8*s.* 6*d.*, the first of which was dishonored. When the second became due, Crowther took to the plaintiff the bill for 130*l.* 10*s.* 6*d.*, which was accepted in the name of Crowther & Co., in the handwriting of Crowther. The two separate bills of Crowther were given up, and, as the evidence indicated very strongly, in exchange for the partnership bill for 130*l.* 10*s.* 6*d.* The cause was twice tried. Upon the first trial, a verdict was found for the defendants; but it was set aside as being against evidence. Upon the second trial, the jury found for the plaintiffs upon both bills; and the plaintiffs having consented to reduce this verdict by the amount of Crowther's two separate bills for 40*l.* and 38*l.* 8*s.* 6*d.* (a clear admission of fraud, as to that part of the transaction at least), it was held in the Exchequer that they might retain their verdict for the residue. Wilson *v.* Lewis, 2 Scott's N. R. 115; Gamble *v.* Grimes, 2 Ind. 392. See also Barber *v.* Backhouse, 1 Peake, 61.

The English rule seems to be very clearly stated by the Master of the Rolls, in Frankland *v.* M'Gusty, 1 Knapp, 301: "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners. But there may be other circumstances attending the transaction, which may afford the separate creditor a reasonable ground of belief that the security so given in the partnership name is given with the consent of the other partners; and these circumstances occurred in the case which was cited, and which seemed to be inconsistent with the other authorities. I refer now to the case of Ridley *v.* Taylor.

have some doubt whether this coincidence between the private debt to be paid, and the paper of the firm which pays it, with no evidence of authority or adoption by the firm, would always be sufficient, in England, to discharge the firm. But, on the other hand, we are quite confident that American courts would require better reason for believing in the good faith of the holder, than any coincidence between the date and amount of the firm's paper and those of the private debt which it pays or secures. In other words, the fact that the private creditor of a partner takes from him the paper of the firm to pay his debt, raises a stronger presumption of fraud in this country than in England.

Lord Eldon says, very truly, that it may be of great moment to a partnership that the mercantile credit of one of the partners should be preserved, and that the courts should not embarrass the lawful use of the paper of a firm, by a partner, for his own accommodation, seeing that this is often connected with the advantage of the firm. (*h*) But to all considerations of this kind there is one answer. The power of a partner is limited by the business of the firm; he who knows that a partner's act is not within the business of the firm, knows that it is not authorized;

In that case the bill was dated eighteen days before its delivery by the partner, to his separate creditor, and it was not known by the creditor that it was drawn and indorsed by the debtor alone; and the bill was to a greater amount than the separate debt. The court, therefore, were of opinion, that there was reasonable ground for the separate creditor believing it not to have been given to him in fraud of the partnership, and that the general presumption, that a partnership security, when applied in payment of a separate debt, is in fraud of the partnership, was repelled by the special circumstances which belonged to that particular occasion. Upon a consideration, therefore, of all the authorities, I am of opinion that the law is, that taken *simpliciter* the separate creditor must show the knowledge of the partnership; but, if there are circumstances to show a reasonable belief that it was given with the consent of the partnership, it lies upon the partners to prove the fraud. I think that will reconcile all the cases." We have already seen (§ 135, note (*d*)), that, in this country, if one partner use the partnership paper under such circumstances of separate advantage to himself, and of collusion or of negligence on the part of the one dealing with him, as to make the transaction *prima facie* fraudulent and void as to the firm, the firm may still be held upon proof of its previous consent to, or subsequent adoption of, the single partner's act. The same is also the doctrine of the English courts. Thus, in *Ex parte* Bonbonus, stated above, Lord Eldon said: "There is no doubt now, the law has taken this course; that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, as if it was for an antecedent debt, *prima facie* it will not bind them: but it will, if you can show previous authority or subsequent approbation; a strong case of subsequent approbation raising an inference of previous positive authority." See Tallmadge *v.* Penoyer, 35 Barb. 120.

(*h*) *Ex parte* Bonbonus, 8 Ves. 544. See The Trader's Bank of Rochester *v.* Bradner, 43 Barb. 379; Freeman *v.* Carpenter, 17 Wis. 126.

and, if all he knows is that the act of the partner is for his own immediate and direct and several benefit, he has no right to presume that the firm are benefited also, and therefore authorized it; because it is generally very easy for him to ascertain how this is, if he wishes not to be a party to a fraud.

§ 136. **Other Acts of Partner in Fraud of Firm.** — Similar doctrines must be applied if a partner disposes of any other securities; or of the goods or property of any kind, of the firm, in payment of his personal debt, or for his personal relief. (*i*) And, generally, the true rule should be, and we are confident that it is so in the United States, that any act whatever of a partner, certainly for his own individual and several benefit, and not obviously for that of the firm also, does not bind the firm, until the holder proves their authority or ratification. When a note signed in the firm name was given not for partnership purposes, and a partner said he would settle it, "if he could get the books, notes, and accounts from the partner who signed the note," and he did not get them, it was held that he was not liable. (*ii*) And a release, by one partner, of a debt due to the partnership, or a receipt of payment, which he has unquestionably authority to give if in good faith, will be inoperative if given for a consideration which is known, or ought to be known, to inure only to his own benefit. And many decisions illustrating this principle may be found in the note. (*j*)

(*i*) See *ante*, § 90.

(*ii*) Burleigh *v.* Parton, 21 Tex. 585.

(*j*) Evernghim *v.* Ensworth, 7 Wend. 326; Gram *v.* Cadwell, 5 Cow. 489; Farrar *v.* Hutchinson, 9 A. & E. 641; Greeley *v.* Wyeth, 10 N. H. 16; Minor *v.* Gaw, 11 Sm. & M. 322. See, however, Halls *v.* Coe, 4 McCord, 136; Beckham *v.* Peag, 2 Bailey, 133. An arrangement is sometimes made between one partner and a customer of the firm, by which it is agreed that goods sold or services rendered to such customer by the partnership shall be paid for by a debt due from that partner alone, or by articles furnished for his separate use. Thus, one of a firm of grocers may agree with a tavern-keeper that the debt of the latter for provisions bought of the partnership shall be set off against the debt of the former for entertainment furnished at the inn. Is such an engagement, entered into by one partner, valid as against his copartners, who are not privy to it? The adjudications seem to be somewhat in conflict. But the doctrine of quite a number of cases seems to be, that as one partner has an undoubted right to sell the goods of the partnership, or to contract for its services; and as he may take pay therefor in behalf of the partnership in either specific articles or money; and as an appropriation by him of such articles or money, once received for the partnership, to his private use, would not subject the party from whom he received them to an action by the firm, — the nature of the case is not changed, if the party, thus dealing with one partner, knows at the time that what he pays for labor, materials, &c., furnished him by the partnership, is intended to come to the use of that partner alone. The disposition of the articles, or money, received by one partner, for benefits conferred by the partnership, is a matter entirely between the different partners. Greeley *v.* Wyeth, 10 N. H. 15; White *v.*

§ 137. **When Fraudulent Paper binds Firm.** — A bill of exchange thus drawn fraudulently or so accepted, or a promissory note so made or indorsed, does not bind the firm to an indorsee of the original wrongful holder or indorsee, even if this second indorsee be wholly innocent, unless he can show that he paid a consideration for it. (*k*) Nor would it be good in his hands, whatever the

Toles, 7 Ala. 569 ; Strong *v.* Fish, 13 Vt. 277 ; Halls *v.* Coe, 4 McCord, 136 ; Henderson *v.* Wild, 2 Camp. 561 ; Perry *v.* Butt, 14 Ga. 699. See also M'Kee *v.* Stroup, Rice, 291 ; Arnold *v.* Brown, 24 Pick. 89, 93 ; Yale *v.* Yale, 13 Conn. 185 ; *contra,* Pierce *v.* Pass, 1 Porter, 232 ; Goode *v.* M'Cartney, 10 Tex. 193 ; Norment *v.* Johnson, 10 Ired. 89 ; Ramey *v.* McBride, 4 Strobh. 12. The practical rule applicable to the point is, we think, well stated in Warder *v.* Newdigate, 11 B. Mon. 174, 177. Where the plaintiffs, partners, had boarded with the defendant, and each had told him "that what one might call for would be the same as if both should order it," the defendant's account for liquors, &c., furnished to each, was held to create a joint indebtedness, and to constitute a valid counter-claim to the demand of the two plaintiffs for goods sold and delivered. Hartung *v.* Siccardi, 3 E. D. Smith, 560. It has been held, that a suit at law cannot be maintained in the names of all the partners, for a debt from which one of the joint plaintiffs has already discharged the defendant, although such discharge may have been a fraud upon the firm, in which the released debtor was participant; as where it has been given in consideration of one partner's receiving a discharge from his private and separate debt. Jones *v.* Yates, 9 B. & C. 532, 539; Wallace *v.* Kelsall, 7 M. & W. 264 ; Gordon *v.* Ellis, 7 M. & G. 607, 621 ; Greeley *v.* Wyeth, 10 N. H. 15 ; Homer *v.* Wood, 11 Cush. 62. Upon similar grounds, it is said, if a partnership draw a bill of exchange, and one partner agrees with the drawee, though in fraud of the firm, that he will provide for it when due, the firm cannot maintain an action on the bill against the acceptor. Richmond *v.* Heapy, 1 Stark. 202 ; Johnson *v.* Peck, 3 Stark. 66 ; Sparrow *v.* Chisman, 9 B. & C. 241. See further Longman *v.* Pole, 1 Moody & M. 223; and compare with Jones *v.* Yates, *supra;* Henderson *v.* Wild, 2 Camp. 561. See also Minor *v.* Gaw, 11 Sm. & M. 322; Brewster *v.* Mott, 5 Ill. 378; Purdy *v.* Powers, 6 Barr, 492. Though a discharge or a release from a debt by one of several plaintiffs who are partners, is, even when fraudulently given, a good defence to the joint action, yet a receipt of payment, given by one of several plaintiffs, copartners, is nothing more, as evidence, than a *prima facie* acknowledgment that the debt sued has been paid ; and the plaintiffs may, notwithstanding, show the contrary. Skaife *v.* Jackson, 3 B. & C. 421 ; Farrar *v.* Hutchinson, 9 A. & E. 641; Opinion of Parke, B., in Wallace *v.* Kelsall, 3 B. & C. 273. See Sherwood *v.* Barton, 36 Barb. 284.

(*k*) Grant *v.* Hawkes, Chitty on Bills, 42; Heath *v.* Sansom, 2 B. & Ad. 291. In this last case, Sansom & Evans were partners under the firm of Sansom & Co. Sansom was also a partner in the Droitwitch Patent Salt Company; and being indebted to them, drew a bill in the name of Sansom & Co., payable to the Salt Company. The latter indorsed the bill to the plaintiff, though not, as it appeared, for any valuable consideration. The plaintiff brought his action against Sansom & Evans. It was held, that the Droitwich Company could not have sued Evans on the note, it being given to them in fraud of Evans; and that, as it did not appear why the plaintiff sued the makers of the note, whom he did not know, rather than the indorsers, who were a solvent and well-known partnership, it was incumbent upon the plaintiff, under the circumstances, to show that he gave a valuable consideration for the indorsement to him. It was held, also, Parke, J., *dissentiente,* that in all cases where, from defect of consideration, the original payees cannot recover on the note or bill, the indorsee,

consideration he gave, if he also was aware of the fraud by which his indorser obtained it. (*l*)

to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. But where, in an action by indorsee against acceptors of a bill of exchange, some of the defendants pleaded that they did not accept, and it was proved that all the defendants were partners, and that one of them, who had suffered judgment by default, had accepted the bill in the name of the firm, in fraud of the partnership, and not for partnership purposes, it was held, that such proof, without evidence of knowledge on the part of the plaintiff, did not, *under the issue*, oblige the plaintiff to prove the circumstances under which the bill was indorsed to him. Musgrave *v.* Drake, 5 Q. B. 185. See Heywood *v.* Watson, 4 Bing. 496; and see the Mechanics' Bank *v.* Foster, 44 Barb. 87.

(*l*) If the partnership prove the note or bill upon which it is sued to have been issued or transferred in fraud of their rights, the burden is now upon the claimant, through the original wrongful holder, to show that he took it fairly, and not under circumstances which could reasonably operate as notice of the fraud. Munroe *v.* Cooper, 5 Pick. 412; Arden *v.* Sharpe, 2 Esp. 524. See Blair Miller *v.* Douglass, Fac. Coll. No. 41. p. 154; cited in Collyer on Part. § 495. And in an action against one partner by the payee of a partnership note, the other partner is a competent witness for the defendant, to prove that the consideration of said note was for the witness's exclusive benefit, given to secure a debt due by him on his own account; and that when he signed the note he informed the plaintiff that he was not authorized to sign the defendant's name to it. Robertson *v.* Mills, 2 H & G. 98. But it is not necessary that *actual* bad faith should be fastened upon the second indorsee of a fraudulently circulated bill or note, to defeat his claim against the firm. It is sufficient if the circumstances under which he became such indorsee show that, but for his gross negligence, he would have learned the fraud in which the paper originated, or by which it had been transferred. N. Y. F. Ins. Co. *v.* Bennett, 5 Conn. 574; Smyth *v.* Strader, 4 How. 404. And, it seems, that if a note is offered at a bank, by one who became a party to it as intermediate indorser, to be discounted for the benefit of the offerer, the transaction on its face would import, that the last indorsement was intended merely to aid the negotiability of the paper, and would throw upon the bank discounting the paper under such circumstances, the *onus* of showing the transaction to have been regular. Mauldin *v.* Branch Bank at Mobile, 2 Ala. 502. See Bank of Vergennes *v.* Cameron, 7 Barb. 143, 150; Cooper *v.* McClarkan, 22 Pa. 80. But if the holder of a partnership negotiable security, issued or negotiated through the fraud of one of the partners, show himself to be a *bona fide* indorsee for value, without notice of the fraud, the undoubted general rule is, that, in such hands, the paper is binding on the firm; and, as we have already seen, knowledge acquired by the holder subsequently to his taking the paper will not affect the *bona fides* of the transaction. Arden *v.* Sharpe, 2 Esp. 524; Wells *v.* Masterman, 2 Esp. 731; Lacy *v.* Wolcott, 2 Dow. & R. 458; Sanderson *v.* Brooksbank, 4 C. & P. 286; Usher *v.* Dauncey, 4 Camp. 97; Sutton *v.* Gregory, 2 Peake, 150; *Ex parte* Bushell, 8 Jur. 937; Bank of Kentucky *v.* Brooking, 2 Litt. 45; Livingston *v.* Roosevelt, 4 Johns. 279; Smith *v.* Lusher, 5 Cow. 689; Vallett *v.* Parker, 6 Wend. 619; Catskill Bank *v.* Stall, 15 Wend. 364, 18 Wend. 466; Vernon *v.* Manhattan Co., 17 Wend. 524, 22 Wend. 183; Evans *v.* Wells, 22 Wend. 325, 333, 20 Wend. 251; North River Bank *v.* Aymar, 3 Hill, 262; Gildersleeve *v.* Mahony, 5 Duer, 383; Rich *v.* Davis, 4 Cal. 22; Le Roy *v.* Johnson, 2 Pet. 186; Emerson *v.* Harmon, 14 Me. 271; Waldo Bank *v.* Lumbert, 16 Me. 416; Dudley *v.* Littlefield, 21 Me. 418; Duncan *v.* Clark, 2 Rich. 587; Babcock *v.* Stone, 3 McLean, 172; Commercial Bank *v.* Lewis, 13 Sm. & M. 226; Freeman *v.* Ross, 15 Ga. 252; Calkins *v.* Smith, 48 N. Y. 614.

§ 138. **Firm when Liable on Individual Note.** — Taking the individual note of a member of a firm for goods sold to the firm will not discharge the other members from liability for the goods, unless there be an agreement with the firm to that effect. And this is so although the note be negotiable, if it remains in the hands of the payee.(*jj*)

On the other hand, if paper be drawn or discounted or received, bearing only the signature of one partner, and the proceeds are directly carried to the partnership funds, the partnership cannot be charged; because it is considered that the credit is given on negotiable paper only to those whose name it bears. (*m*) But as between the partners it is a partnership note; and, if one partner pays it, he may charge it to the account of the firm. (*mm*)

§ 139. **Usual Signature binds Firm.** — The strictness of the rule has been relaxed so far as to hold the firm liable, when, by proof of usage or otherwise, it was found that this was the way in which they signed their paper; for this, in fact, makes the partner's name the name of the firm, as to these transactions. (*n*)

Hence, equity will restrain by injunction the negotiation of a bill of exchange, though in the hands of a holder for value, if he took it knowing that it had been improperly accepted, by one of the partners, in the name of the partnership. Hood *v.* Aston, 1 Russ. 412. In general, however, the fact that one partner has given the partnership name on his own separate account is a matter of legal defence only, and equity cannot relieve unless defence at law be impracticable. Sneed *v.* Cogle, 4 Litt. 162.

To an action by indorsee against A. & B., as drawers of a bill of exchange, indorsed to C., and by him to the plaintiff, A. pleaded that he and B. were in copartnership as brewers; that B. made and indorsed the bill, using the name of the firm, in fraud of A., and not for the purposes of the copartnership, but for his own private purposes, namely, for a private debt due from him to C., and without the knowledge or consent of A.; that there was no consideration or value to him, A., for the drawing or indorsement of the bill: of all which premises, C., at the time of the indorsement to him, had knowledge and notice; and that at the time when the bill was indorsed and delivered to the plaintiff, he had full knowledge and notice of all the premises in the plea aforesaid. Replication, that, at the time when the bill was indorsed and delivered to the plaintiff, he had not any such knowledge or notice as in the plea mentioned; and issue thereon. At the trial, the jury found that C. had no knowledge of the original fraud in the drawing of the bill; but that the plaintiff, at the time of the indorsement to him, had knowledge of that fraud. It was held, that the plea was not proved. May *v.* Chapman, 16 M. & W. 355.

(*jj*) Folk *v.* Wilson, 21 Md. 538. [See *ante*, § 89.]

(*m*) Farmers' Bank of Mo. *v.* Bayless, 35 Mo. 428, 41 Mo. 274; Emly *v.* Lye, 15 East, 7; Siffkin *v.* Walker, 2 Camp. 308; *Ex parte* Hunter, 1 Atk. 223; *Ex parte* Bolitho, Buck, 100; Denton *v.* Rodie, 3 Camp. 493; Bevan *v.* Lewis, 1 Sim. 376. See Loyd *v.* Freshfield, 2 C. & P. 325; Graeff *v.* Hitchman, 5 Watts, 454; Jaques *v.* Marquand, 6 Cow. 497; Willis *v.* Hill, 2 Dev. & B. 231; Allen *v.* Coit, 6 Hill, 318; Rogers *v.* Coit, 6 Hill, 322; Green *v.* Tanner, 8 Met. 411. [See *ante*, § 88.]

(*mm*) Sprague *v.* Ainsworth, 40 Vt. 47.

(*n*) South Carolina Bank *v.* Case, 8 B. & C. 427. And see Hubbell *v.* Woolf, 15 Ind. 204; Schollenberger *v.* Seldonridge, 49 Pa. 83.

So, too, if a partner uses neither his own name nor that of the firm, but a fictitious one, and does this in partnership business and on partnership account, if his partnership can be shown to have authorized or to have adopted the act, they will be held as if this name were theirs. (*o*)

§ 140. **Two Firms with Common Member.** — If there be two houses of the same name, entirely independent and disconnected in their business, no other difficulty can arise than what may occur when one man is charged as liable on paper which another man of the same name has made. It is a question of fact, and not of law. But if there be one person who is a partner in both of these houses, a new question arises. And it seems to be held, that a partner in one may be made liable on the paper of the other, unless he could show that the holder knew that the paper was that of the other exclusively: (*q*) as a general rule, it may be said that if two or more firms are connected in business, and use the same name, a holder of the paper having that name may charge upon it either of the partnerships, at his own election; unless he knew, or ought to have known, definitively, that it belonged to one of them, and not to the other. But though he may thus elect to consider it as the paper of one or the other, he cannot treat it as the paper of both, unless their connection be such as to make them in fact but one firm. (*r*)

§ 141. **Joint and Several Notes.** — A joint and several note by all the members of a firm is not strictly a partnership note, nor has it the same effect;[1] nor could the holder, in case of insolvency,

(*o*) Williamson *v.* Johnson, 1 B. & C. 146.

(*q*) Baker *v.* Charlton, 1 Peake, 80.

(*r*) M'Nair *v.* Fleming, cited in Mont. on Part. 37, 3 Dow. 229; Miller *v.* Consolidation Bank, 48 Pa. 514.

[1] A note signed by the partners individually is not upon its face a partnership note; and the presumption is that on such a note the partners individually are bound, but not the firm. Freeman *v.* Campbell, 55 Cal. 197; *Ex parte* Weston, 12 Met. 1. But if the note was given for partnership purposes, it binds the firm. *In re* Thomas, 17 N. B. R. 54, 8 Biss. 139; De Jarnette *v.* McQueen, 31 Ala. 230; Iddings *v.* Pierson, 100 Ind. 418; Carson *v.* Byers, 67 Ia. 606, 25 N. W. 826; *Ex parte* Nason, 70 Me. 363; Trowbridge *v.* Cushman, 24 Pick. 310; Agawam Bank *v.* Morris, 4 Cush. 99; Maynard *v.* Fellows, 43 N. H. 255; McKee *v.* Hamilton, 33 Oh. St. 7; Warriner *v.* Mitchell, 128 Pa. 153, 18 Atl. 337: Kendrick *v.* Tarbell, 27 Vt. 512. So of a bond: *Ex parte* Stone, L. R. 8 Ch. 914; Howell *v.* Moores, 127 Ill. 67; Berkshire Woolen Co. *v.* Juillard, 75 N. Y. 535. But see *In re* Holbrook, 2 Low. 259; *In re* Herrick, 13 N. B. R. 312; Turner *v.* Jaycox, 40 N. Y. 470; Crouch *v.* Emmerson, 3 Humph. 209. So where one partner draws and the other indorses a note for partnership purposes, it has been held a firm note. Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913.

claim from the partnership funds; and, if it be signed by some of the partners only, it will have no operation against those not signing it. (s)

That one partner may sign a note so as to hold all jointly and himself severally, there can be no doubt. If A. makes a joint and several note, and signs it "A., B., & Co.," and also "A.," he may perhaps be so held. If there be no words making it joint and several, it is only the joint note of all, which it is by the signature A., B., & Co.; and therefore the signature A. is surplusage and inoperative.[1] But if the signature is "A., B., & Co., by A.," then it is certainly the signature of the company by an agent, who might be held severally, if want of authority or other circumstances made him so liable, but who is no more held in severalty because he is a partner than he would be if he were not. If the words were, "I promise," &c., it might tend to hold the signer severally, but would not, we think, be sufficient for this.(p)

(s) Perring *v.* Hone, 4 Bing. 28; Crouch *v.* Bowman, 3 Humph. 209. See Norton *v.* Seymour, 3 C. B. 792; Kendrick *v.* Tarbell, 27 Vt. 512; *In re* Warren, Daveis, 320; Filley *v.* Phelps, 18 Conn. 294; De Jarnette *v.* McQueen, 31 Ala. 230; *ante,* § 97.

(p) See Galway *v.* Matthew, 1 Camp. 403. This case *expressly* decides that on a note of the above description the whole firm are liable. But it is an *inference* only that in such a case the partner signing his own and the firm's name, could be separately sued. This, however, *is* expressly decided in Hall *v.* Smith, 1 B. & C. 407. But Hall *v.* Smith has been overruled in the Exchequer, and cannot now be regarded as an authoritative decision. See *Ex parte* Buckley, 14 M. & W. 469. Parke, B.: "I really must say that I think Hall *v.* Smith cannot be supported." Alderson, B., concurred. Platt.: "I have no doubt that Hall *v.* Smith cannot be supported." Maclae *v.* Sutherland, 3 E. & B. 34, 35; Staats *v.* Howlett, 4 Denio, 559. Compare Owen *v.* Van Uster, 10 C. B. 319. See also *Ex parte* Christie, 8 Jur. 919. See also Wilks *v.* Back, 2 East, 142; Doty *v.* Bates, 11 Johns. 544. In this last case, a note made by one partner, and beginning, "I promise to pay," but signed with the name of the firm, was held binding on the partnership, as meaning, "*I, one of the partners, promise on behalf of the firm,*" &c. A note signed by one partner only, "for himself and partners," will satisfy the terms of an Act of Parliament, which requires a writing to be signed "with his or their name or names," and will, therefore, be a valid note, and binding on the firm. Meux *v.* Humphrey, 8 T. R. 267. See Smith *v.* Bailey, 11 Mod. 401. And if in an action against the drawers of a bill, or the makers of a promissory note, the declaration states the defendants to have made the bill or note, "their own proper hands being thereunto subscribed," a bill or note subscribed with the partnership name of the defendants by one of them is sufficient to support such averment. Jones *v.* Mars, 2 Camp. 305; Porter *v.* Cumings, 7 Wend. 172. See Snow *v.* Howard, 35 Barb. 55. Whether it is within the general implied powers of one partner to bind his copartner in an obligation which shall make him severally liable to a creditor, so as to deprive such

[1] Where a partner signs commercial paper with the firm name and adds his own name under it, the partner seems not to be held liable separately. *In re* Barnard, 32 Ch. D. 447 (C. A.); Malcomson *v.* Malcomson, L. R. 1 Ire. 228.

§ 142. **Debt incurred before Formation of Partnership.** — If a partnership be contemplated and agreed upon, and a purchase is made or a debt otherwise incurred by one of the partners for the partnership, but before the actual formation of the partnership, it is only the debt of that partner: but this indebtedness is a sufficient consideration to sustain the subsequent promise of the partnership when formed, given in lieu of it or to secure it. (*t*)

§ 143. **Accommodation Paper.** — There are some acts in relation to negotiable paper which carry with them the presumption that the partner doing them was not authorized. One of these is the indorsing of paper which does not belong to the firm. This is, in fact, lending or giving the credit of the firm. There can be no doubt that this is frequently done by mercantile firms. Sometimes they lend their credit, and are paid for it by a compensation for the guaranty. Sometimes they reciprocate accommodation paper with another firm, each indorsing for the benefit of the other; and the notes are of the same amount, or equalized in some way, and perhaps made for some broken amount, to give them the appearance of business paper. Of course, a partnership is liable where it authorizes any such use of its name. But this is no part of general and regular mercantile business, and therefore the presumption of the law is rather against the authority of the partner who so signs the name. (*u*) But this presumption may be overcome not only by direct evidence of authority, but from usage or frequent recognition of such signature, or such other similar facts as would satisfy a jury that the signature was for the partnership and by its authority. (*v*)

copartner of a defence in abatement for the nonjoinder of his codebtor as defendant, when prosecuted at law upon the obligation, is doubted by Wells, J., in Ganson *v.* Lathrop, 25 Barb. 455.

(*t*) Saville *v.* Robertson, 4 T. R. 720.

(*u*) The principle is clearly stated by Walworth, Chancellor, in Stall *v.* Catskill Bank, 18 Wend. 466, 477. See also Bank of Tennessee *v.* Saffarrans, 3 Humph. 597. New York F. Ins. Co. *v.* Bennett, 5 Conn. 574; Mauldin *v.* Branch Bank at Mobile, 2 Ala. 502; Lang *v.* Waring, 17 Ala. 145; Gansevoort *v.* Williams, 14 Wend. 133, 139; Williams *v.* Walbridge, 3 Wend. 415; Austin *v.* Vandermark, 4 Hill, 261; Bank of Vergennes *v.* Cameron, 7 Barb. 143, 150. But this presumption does not arise where accommodation paper, executed by one partner in the name of the firm, is in reality for the benefit of the partnership, rather than for that of him to whom it is given. As where a bill, drawn by one partner upon the firm, and accepted by him in the firm's name, for the accommodation of the payee, is given in exchange for the paper of the latter, to be used in raising money for the purposes of the partnership. Gano *v.* Samuel, 14 Ohio, 592.

(*v*) Bank of Tennessee *v.* Saffarrans, 3 Humph. 597; Whaley *v.* Moody, 2 Humph. 495; Gansevoort *v.* Williams, 14 Wend. 133, 139; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Sweetser *v.* French, 2 Cush. 309; Bank of Kentucky *v.* Brooking, 2 Litt. 41, 45; Darling *v.* March, 22 Me. 184, 188; Tanner *v.* Hall, 1 Barr, 417; Dundass *v.* Gallagher, 4 Barr, 205. But, though it appear that each of two part-

§ 144. **Guaranty in Name of Firm.** — It is also a general rule, that no partner has any authority implied from the mere fact of partnership to become surety for any debt in any way, and bind the partnership thereto. (*w*) The reason from which this rule originated, is, that the proper business of a partnership is most usually buying and selling; and therefore there is seldom a presumption that anything but this is within their business. And the same rule applies, for the same reason, to guaranties given by one partner in the name of the firm. But the question is always open to evidence; and the holder of the guaranty may show not only the peculiar usage of that firm, or their frequent recognition of such guaranties, (*x*) but also that the nature of their business is such as to make this giving of guaranties a part of it. So Lord Mansfield said in relation to bankers; (*y*) and it has been

ners has repeatedly, with the knowledge and assent of the other, *indorsed* accommodation notes in the firm name, this is not sufficient evidence that either of them is authorized to sign the firm name to such paper as *maker and surety*. Early *v.* Reed, 6 Hill, 12. Paper, however, to which the partnership name has been affixed by one partner by way of accommodation, is always binding upon the firm, in the hands of a *bona fide* holder of value, taking it without notice of the circumstances, express or implied. Id.; Catskill Bank *v.* Stall, 15 Wend. 364; Austin *v.* Vandermark, 4 Hill, 259; Gano *v.* Samuel, 14 Ohio, 592; Waldo Bank *v.* Lumbert, 16 Me. 416; Mauldin *v.* Branch Bank at Mobile, 2 Ala. 503, 513; Beach *v.* State Bank, 2 Ind. 488.

(*w*) Foot *v.* Sabin, 19 Johns. 154; Laverty *v.* Burr, 1 Wend. 531; N. Y. F. Ins. Co. *v.* Bennett, 5 Conn. 574, 580; Andrews *v.* Planters' Bank, 7 Sm. & M. 192; Langan *v.* Hewett, 13 Sm. & M. 122; Wagnon *v.* Clay, 1 A. K. Marsh. 257; Rollins *v.* Stevens, 31 Me. 454; New York F. Ins. Co. *v.* Bennett, 5 Conn. 583; Butler *v.* Stocking, 8 N. Y. 408. See farther for the general principle, Sweetser *v.* French, 2 Cush. 309, 314; Rolston *v.* Click, 1 Stewart, 526; Kibbler *v.* De Forest, 6 Ala. 92; Bank of Rochester *v.* Bowen, 7 Wend. 158; Long *v.* Carter, 3 Ired. 238. The ratification by a firm of the unauthorized act of one partner, in signing the firm name to a contract of suretyship, is ineffectual as against existing partnership creditors, being in substance an adoption by the firm of a private debt of one partner. Kidder *v.* Page, 48 N. H. 380.

(*x*) And a recognition and adoption, express or implied, subsequent to the giving of the guaranty, may be given in evidence as well as a prior authority; and either the one or the other may be shown by parol as well as by a written document. Duncan *v.* Lowndes, 3 Camp. 478; *Ex parte* Nolte, 2 Glyn & J. 305, 306; Crawford *v.* Sterling, 4 Esp. 207; Halseham *v.* Young, 5 Q. B. 833; Long *v.* Carter, 3 Ired. 241; Mayberry *v.* Bainton, 2 Harr. Del. 24. See Coursey *v.* Baker, 7 H. & J. 28. In Sweetser *v.* French, 2 Cush. 309, 314, Metcalf, J., states very clearly the law respecting guaranties as established both in England and this country. See also Hamill *v.* Purvis, 2 Barr, 177; Sutton *v.* Irwine, 12 S. & R. 13. Partners may give in evidence a disclaimer of a guaranty, and a refusal to be concerned in it. —— *v.* Layfield, 1 Salk. 292. And whether a guaranty has been given by one partner with the privity and consent of all, is a question for the jury. Payne *v.* Ives, 3 Dow. & R. 664.

(*y*) Hope *v.* Cust, 1 East, 53. If a guaranty given by one partner can be considered as an assurance or representation made in the usual course of, and

held, that in horse-dealing it is so customary to sell with warranty, or rather so rare to sell without it, that a buyer may presume that a partner (or any agent) having authority to sell has thereby authority to warrant. (z) The power or authority to sell generally does not carry with it the power to warrant; but we should be disposed to hold that a warranty by any partner, of the property of the firm lawfully sold by him, would hold the firm, if made and received in good faith. (a)

§ 145. **Power to indorse Negotiable Paper.** — [The indorsement of commercial paper has a double effect: it passes property and it binds the indorser to a subsequent holder. We have seen that one partner has power to transfer firm property, and therefore to indorse a firm note for the purpose of transferring it: [1] he has the power by his indorsement in the firm name also to bind the firm to subsequent holders.[2]

If he indorses firm paper for his private purpose, the indorsee cannot of course hold the paper against the firm; nor could any subsequent holder with notice.[3] It becomes important therefore to determine what transactions, apparent on the face of the note, are notice of fraud on the firm. Where the private note of a partner is indorsed by the firm name, the firm not being a party

with reference to, the business of the firm, it will be binding on the partnership, as being an act entirely within the scope of one partner's authority. See Crawford v. Sterling, 4 Esp. 209; Sutton v. Irwine, 12 S. & R. 13. But one partner will not be deemed to have the power of giving a guaranty in the name of the firm, merely in consequence of its being a *reasonable* mode of carrying into effect an acknowledged partnership contract. Brettel v. Williams, 4 Exch. 623.

(z) "A case may be put, where two persons in partnership, for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt that if upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound." Per Abbott, C. J., in Sandilands v. Marsh, 2 B. & Ald. 679. See Penn v. Harrison, 3 T. R. 760.

(a) In Sweet v. Bradley, 24 Barb. 549, the defendant, a member of the firm of B. Bradley & Co., sold some promissory notes belonging to the firm, received the proceeds, and applied them to the use of the firm. At the sale, he assured the purchaser of the paper that he would warrant that the notes were given in the regular course of business, and would be paid; that the makers and indorsers were responsible and men of abundant means. The notes having been bought upon the strength of these and other similar representations, which proved to be false, it was held that the firm was bound by the representations of the partner who sold the notes; and that an action would lie against all the members of the firm, upon the warranty.

[1] *Ante*, § 108.

[2] Waldo Bank v. Lumbert, 16 Me. 416; Tevis v. Tevis, 24 Mo. 535; Tompkins v. Woodyard, 5 W. Va. 216.

[3] Second Nat. Bank v. Hume, 4 Mack. 90; Allen v. Cary, 33 La. Ann. 1455; Livingstone v. Roosevelt, 4 Johns. 251.

to the note, the indorsement is clearly for the accommodation of the partner, and any holder has notice that it was not made in the course of business, and is put upon his inquiry.[1] But where the note of an individual partner is made payable to a firm, and is indorsed by the partner in fraud of the firm, an innocent holder for value may enforce it against the firm,[2] although the individual creditor to whom it was given could not, in the ordinary case.[3] So where a partner draws a firm draft to his own order, this is not of itself notice of irregularity.[4] Where a partner in two firms makes a note in the name of one firm payable to the other, and indorses the name of the other firm, a subsequent holder for value is not affected with notice.[5]]

§ 146. **Notice of Dishonor.** — [Notice of the dishonor of negotiable paper is good if sent to a single partner, whether before or after dissolution.[6]]

SECTION IV.

OF THE POWER OF A MAJORITY OF THE PARTNERS.

§ 147. **Power of a Majority.** — Whether a majority in numbers of the partners can lawfully control the rest, and conduct the affairs

[1] National Bank of the Commonwealth *v.* Law, 127 Mass. 72; Tanner *v.* Hall, 1 Barr, 417; Cooper *v.* McClurkan, 22 Pa. 80; (but see Ihmsen *v.* Negley, 25 Pa. 297;) Tompkins *v.* Woodyard, 5 W. Va. 216. *Contra,* Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514.

[2] Redlon *v.* Churchill, 73 Me. 146; Manning *v.* Hays, 6 Md. 5; Atlas Nat. Bank *v.* Savery, 127 Mass. 75.

[3] Mechanics' Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475; Tevis *v.* Tevis, 24 Mo. 535; Commercial Bank *v.* Warren, 15 N. Y. 577.

[4] Haldeman *v.* Bank of Middletown, 28 Pa. 440.

[5] Atlantic State Bank *v.* Savery, 82 N. Y. 291. But if the note were made to the order of the partner, so that the second firm was a party only as indorser, this would seem to be notice that the note was not given in the course of business of the second firm. *Contra,* however, Ihmsen *v.* Negley, 25 Pa. 297. Where a partner drew and signed a note, and under his own signature added that of the firm, it was held to be a question for the jury whether the form of the note was notice of any irregularity. Sherwood *v.* Snow, 46 Ia. 481. See Ames, Cases on Part. 527 *n.*, 533 *n.*

[6] Coster *v.* Thomason, 19 Ala. 717; Slocomb *v.* Lizardi, 21 La. Ann. 355; People's Bank *v.* Keech, 26 Md. 521; Bouldin *v.* Page, 24 Mo. 594; Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; Hubbard *v.* Matthews, 54 N. Y. 43. See Bank of America *v.* Shaw, 142 Mass. 290, 7 N. E. 779. If one partner resides at a distance from the firm business and the place of payment, notice to him alone has been held not sufficient. Hume *v.* Watt, 5 Kas. 34. After the death of a partner, notice to the surviving partner has been held sufficient to bind the estate of the deceased partner. Dabney *v.* Stidger, 4 Sm. & M. 749. But see Cocke *v.* Bank of Tennessee, 6 Humph. 51, *contra.*

of the partnership at their own pleasure, has been much discussed. At one time there was certainly a strong tendency to sustain this power, and to extend it over all the affairs of the partnership, provided only that it was exercised honestly and deliberately, and with every reasonable opportunity to the minority to make their wishes and the reasons for their wishes known and duly considered. It has, as certainly, been the tendency of the courts in later years to limit this power narrowly, and almost confine it within what may be called the domestic acts of the firm; as, for example, the appointment or salary of a clerk, the arrangements of the counting-room, method of conducting sales, or keeping accounts, and the like. And, even as to these, it is put upon the apparent necessity of deciding as to how that shall be done which must be done in some way. Whereas, if the partnership cannot agree about a purchase, or a sale, it may be omitted, and the business nevertheless go on. Recent American decisions appear to enlarge this power somewhat. Thus, it has been held that a majority of a firm established to publish a newspaper has authority to appoint or remove a publisher. (*aa*) It will be apparent, however, from the authorities presented in our note, that the law as to the power and authority of a majority of copartners cannot be considered as definitively established. (*b*)

(*aa*) Peacock *v.* Cummings, 46 Pa. 434. But see Yeager *v.* Wallace, 57 Pa. 365.

(*b*) Chitty says (3 Laws of Commerce, 236) that, in the absence of express stipulations between the partners, "a majority must decide as to the disposal of the partnership property; or, if no majority can be obtained to decide as to such disposal, or there are but two partners in the firm, one or more partners may manage the concern as they think fit; provided it be within the rules of good faith, and warranted by the circumstances of the case." To this Collyer adds (Collyer on Part. § 197): "It will be observed that this opinion is given with considerable caution, and perhaps it may be laid down that, in a partnership without articles, the power of the majority to bind the minority is confined to the ordinary transactions of the partnership." The English authorities on the point are few, and by no means conclusive. In Robinson *v.* Thompson, 1 Vern. 465, it was held, that an account of the profits of a voyage settled by the major part of the part-owners should conclude the rest. And in Falkland *v.* Cheney, 5 Bro. P. C. 476, 1 Bro. P. C. (Dublin ed.) 90, it seems to have been laid down as a general principle that, in all sea adventures, the act of a majority binds the whole. But in that case such power was given to the majority by the articles of association. See Lloyd *v.* Loaring, 6 Ves. 777. Perhaps the weightiest authority to be found in the English books is the *dictum* of Lord Eldon in Const *v.* Harris, Turner & R. 516, 525. After declaring that the act of the majority of the partners is to be considered the act of all, he adds: "I call that the act of all, which is the act of the majority, provided all are consulted and the majority are acting *bonâ fide*; meeting, not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say, 'We do not care what one partner may say: we, being the ma-

§ 148. **As to Third Persons.** — We may consider this question in reference to third persons, and also in reference to the partners themselves. If the majority propose to deal with a customer, either in the way of purchase or sale, in a manner to which the minority do not assent, it is certain that the minority, whether they withhold authority or not, will be bound, if they do not communicate their dissent to the customer, provided the transaction be within the scope of the partnership business; for so would the majority be bound if the minority so did it, and so would all the partners be bound if any one of them so did it. On the other hand, if it be not within the business of the firm, neither a majority nor a minority would be bound to third persons, unless these persons could show themselves to have believed and to have been authorized to believe that it was within the business of the firm, or that the firm had made it theirs by adoption or ratification.

All that we have said results necessarily from principles which have been fully considered in former chapters. Let us here sup-

jority, will do what we please,' is, I apprehend, what this court will not allow. In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other: they are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded; what weight is to be given to it is another question."

The American authorities are not much more numerous nor satisfactory. The opinion of the court in Kirk *v.* Hodgson, 3 Johns. Ch. 400, contains expressions which, considered by themselves, would appear to give unqualified support to the above *dicta* of Lord Eldon. But Chancellor Kent, who rendered the decision in that case, says of it, in his Commentaries, that it "related only to the case of the management of the interior concerns of the partners among themselves; and to that it is to be confined." 3 Kent Comm. [45]. We have, however, two cases in which the doctrine is asserted, that where a firm, without articles, consists of more than two members, any contract within the sphere of the joint business, made in good faith by the majority, will be binding on the whole, notwithstanding at the time of, or previous to, the making of the agreement, the minority expressly dissent, and communicate their dissent to the third party with whom it is made. See Johnston *v.* Dutton, 27 Ala. 245; Campbell *v.* Bowen, 49 Ga. 417. See also Western Stage Co. *v.* Walker, 2 Iowa, 504; Irvine *v.* Forbes, 11 Barb. 587. In Kirk *v.* Hodgsdon, 3 Johns. Ch. 400, E., K., & D., in trade, employed H. as their clerk, at a fixed annual salary, but with the understanding that the salary should be increased with the increase of the firm business and of H.'s duties. In the third year, it was discovered that H. had overdrawn money of the firm and applied it to his own use; and this breach of trust was confessed by him. Nevertheless, a majority of the firm, E. & D., continued H. afterwards in his employment. It was held, that this fact was decisive in favor of the continuance of the rights of H. and of his claim to the stipulated increase of salary; that it was evidence that he had not forfeited the confidence of the firm, and that the overdrawings, charged and confessed, were not understood by them to be acts of intentional fraud; and that they could not, therefore, be set up by the firm against his claim, founded on their promises and acknowledgments, and his services.

pose that the question refers to some single act. The majority of a house dealing in cotton wish to sell one hundred bales at a certain price, and the minority refuse to consent; the majority make the sale, deliver the cotton, and take notes or money for it; can the buyer hold this cotton by good title? Certainly, if the minority express no dissent; but, if they do express dissent and positive prohibition, is the transaction then valid? It might not be easy to reach the question at law. The minority alone, that is, without the majority, would find it difficult to maintain replevin or trover, or any other action, for the cotton or its value. And it would not seem, commonly at least, to be a case in which a court would permit a minority to use the names of the majority as coplaintiffs against their will. If the minority sold the same cotton to another customer, and let the two purchasers contest the title of each other, the purchaser from the minority alone would certainly have no better title than the purchaser from the majority alone. If the question were considered in equity, all the circumstances of the case would be duly regarded, and, among others, the right or absence of right of the minority to dissolve the partnership at will. (c) For, if they have this right, it would seem that they could exercise it, in case of irreconcilable and material difference of view or purpose. And, if they did not exercise it, they might be considered as yielding to the majority, for the sake of preserving the partnership, and so adopting the transaction. If they could not dissolve it, because it was established for a time certain, and if the conduct of the majority was unreasonable and oppressive, this would be a good ground for the other partners asking of the court a dissolution of the partnership; and generally, if they did not, it would, we think, be taken

(c) In both the cases, Johnston *v.* Dutton, 27 Ala. 245, and Western Stage Co. *v.* Walker, 2 Iowa, 504, cited in preceding note, the partnership was, by articles, to continue for a time certain, and in both the actions were at law. In Johnston *v.* Dutton, the attention of the court seems to have been called to views similar to those represented in the text. See argument of counsel, pp. 250, 251. The court, however, said, p. 253: "We do not consider the cases to which we have been referred, holding that one partner has the right, at pleasure, to dissolve a partnership, although the articles provide that it is to continue for a specified term, as having any bearing on the case under consideration. Conceding they are law, which is doubtful, the decisions rest solely upon the ground, that the limitation of the right of dissolution is incompatible with the nature of the partnership contract; and this principle does not militate against the positions we have asserted. The dissent, in the present case, cannot be regarded as a dissolution; for, if effectual, it would not, necessarily, produce that result, although it might operate to change the mode of conducting the business. In other words, it might be carried on without contracting debts."

as before, that by not dissolving the partnership they acceded to the wishes of the majority. But there certainly might be cases in which the act of the majority would be injurious to the minority, and an immediate dissolution even more so, and the majority would be deemed to have no right to inflict upon a minority either of these mischiefs. Then the court would decree such annulling of the act, or compensation, or other remedy, as justice between all the parties and the power of the court should authorize and require. But these considerations touch rather the rights and interests of the partners. So far as the customer, the third party, is concerned, — always supposing the transaction honest as to him, — we should say that the question of the power of a majority would be put aside both in law and in equity by the general rule, that, if the transaction were within the business of the firm, it bound all the partners who gave no notice to the third party; and, on the other hand, that it did not bind recusant and protesting partners who gave sufficient notice of their dissent; (*d*) and that, if it was without the business of the partnership, it bound nobody but those who authorized the act or ratified it.

§ 149. **Between the Partners themselves.** — If the question of a majority related only to those things to which no person out of the partnership was privy, it would assume a somewhat different aspect. Suppose, for example, a majority chose to enlarge or vary the business importantly, or enter upon a new business, which things no partner can do by his implied authority, can the majority compel the minority to acquiesce in this? We should say that they certainly could not. (*e*) And yet it must generally be the case, that if the majority persisted, and the minority did not dissolve the partnership or seek relief from a court of equity, but did go on with the business in the manner proposed by the majority, this would be deemed evidence of their consent. Still,

(*d*) See *ante*, § 147, note (*b*).

(*e*) Natusch *v.* Irving, Gow on Part. App. p. 398; *ante*, § 131, note (*x*). See Const *v.* Harris, Turn. & R. 524; Livingston *v.* Lynch, 4 Johns. Ch. 573. In Abbott *v.* Johnson, 32 N. H. 9, it appeared that a number of persons, among them the plaintiffs, formed a written agreement of copartnership, for the purpose of carrying on a retail trade in domestic and foreign goods. By one of the articles it was provided that there should be "neither purchase nor sale of ardent spirits by the concern." The articles were afterwards altered by the company so as to allow a trade in ardent spirits to be carried on. The court said: "We can have no hesitation in holding, that this was such a substantial alteration as discharged the plaintiffs from their obligation to proceed with the partnership, unless they agreed to the change, and that it gave them the right to retire from the firm, . . . if they did it under circumstances which were such as to do no injury to the partners who chose to go on under the new arrangement."

the universal principle would apply, that waiver or consent is implied by acquiescence only when that acquiescence is free and voluntary; and therefore this evidence, or presumption, might be rebutted by showing that circumstances had placed the minority so far in the power of the majority that they must go on and submit for a time, reserving all their rights of dissent, or suffer important injury, and then their so going on would not be held as necessarily implying a waiver or loss of any right. These views are, to some extent, only theoretic; and it is perhaps a little remarkable that cases of conflict of interest or wishes between partners have not been before the courts of England or this country often enough to settle the question by adjudication as to the power of a majority.[1]

SECTION V.

OF THE DUTY OF PARTNERS TOWARD EACH OTHER.

§ 150. **Good Faith between Partners.** — The first and highest duty which partners owe to each other, is that of perfect good

[1] *Power of majority.* — The tendency of the modern cases seems to be in the direction of giving to a majority of the partners entire power to act in all matters within the scope of the firm business. See Clarke *v.* Slate Valley R. R., 136 Pa. 408, 20 Atl. 562, where it was held that two partners out of three have power to sign a warrant of attorney, in order to authorize a suit in the firm name. So it has been held that in the absence of fraud a majority of the partners in a firm formed to sell ice may give a good title to ice of the firm, though the dissent of the minority is made known to the purchaser. Staples *v.* Sprague, 75 Me. 458.

On the other hand, no mere majority of the partners has a right to change the location of the business without consent of all. Jennings's Appeal, (Pa.) 16 Atl. 19, 2 Monaghan, 184. And where the lease of business premises expired during the continuance of the partnership, and the partners could not agree to continue business there, it was held that part of the partners could not fix the location of the business, but all must agree. Clements *v.* Norris, 8 Ch. D. 129 (C. A.) This was, to be sure, a case of disagreement between two partners; and the decision might perhaps have been different if a majority had desired to continue the business in the old location.

Where a partner leaves the place where the business is carried on, the remaining partners must of course exercise entire control over the business, though no doubt they have no power to vary the nature of it. So where one partner who alone had control of the finances of the firm went away, having named another partner to take his place, it was held that the remaining partners, and not the single one named, had control over the finances, and might arrange a settlement of the affairs of the firm. Sweet *v.* Morrison, 103 N. Y. 235, 8 N. E. 396.

faith. (*ee*)[1] In the Roman civil law, the "societas" of merchants for trade, and of husband and wife, were considered closely analogous, and in many respects governed by the same principles. (*f*) Indeed, what we have already said indicates sufficiently how much partners are in the power or at the mercy of each other, and there certainly seems to be no relation in life, calling, either by its own exigencies or by the rules of law, for a more absolute good faith than the relation of partnership. (*g*)

After this comes the duty of having and using the skill and knowledge which the partnership requires; of applying to all its affairs due care; of devoting to them a reasonable measure of time and labor; and of conducting all its concerns, private or public, with due economy. For the breach of any one of these duties, the party is held responsible. (*h*) A court of equity, in particular, will always decree such compensation, in form or kind and amount, as shall be needed to make good any losses arising from any violation or disregard of these duties. (*i*)

The rule would extend, by the reason of it, to the manner of doing anything. Hence, as no partner should do that which he has no lawful power to do, so he should do everything he has power to do either by the general law of partnership or by special stipulation in the articles, — as, for example, the assigning of his share,[2] or the giving of partnership security, — in such a way as a due regard for the interests of the partnership would require. (*j*)

(*ee*) See Nicholson *v.* Janeway, 1 Green (N. J.), 285. [Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.]

(*f*) Vin. Comm. lib. 3, tit. 26, § 2; Pothier, Contr. de Soc. ch. 3.

(*g*) Baker *v.* Charlton, 1 Peake, 80. See England *v.* Carling, 8 Beav. 129, for an example of bad faith between partners, and of the displeasure with which it is viewed by the court. See also Blissett *v.* Daniel, 11 Hare, 493, Ault *v.* Goodrich, 4 Russ. 434.

(*h*) See *post*, § 154, as to how far a partner may engage in other business, besides that of the firm. See the remarks of Redfield, C. J., in Pierce *v.* Daniels, 24 Vt. 624.

(*i*) See *post*, ch. 8, § 204 *et seq.*, respecting the remedies between partners which courts of equity administer. See Lefever *v.* Underwood, 41 Pa. 505. If a partner neglects to render the personal services which he ought to render, he will be charged with their value in settlement of the partnership account. Marsh's Appeal, 69 Pa. 30.

(*j*) The rule that each partner must do all he can for the benefit of his firm has, of course, its limitation in the reason of the thing and the circumstances of each

[1] The duty of good faith toward his partners is especially incumbent upon a managing partner. Brooks *v.* Martin, 2 Wall. 70; Kimberly *v.* Arms, 129 U. S. 512; Fulmer's Appeal, 90 Pa. 143.

[2] The sale of one partner's interest to another is not a breach of duty. Cassels *v.* Stewart, 6 App. Cas. 64.

In every bargain which he makes, he must remember a principle laid down emphatically by Lord Eldon, — that it is his duty to use the property for their benefit whose property it is; (*k*) that is, for the benefit of the whole as one concern, or one body, for so it is owned. So if a partner by any means gets possession of a fund properly belonging to the firm, he must share any profit or advantage arising from it, with his copartners.(*kk*)

§ 151. **Partner charged with Loss caused by His Fault.** — If losses occur by reason of a breach of duty by a partner, in any way whatever, whether through fraud, negligence, ignorance, or extravagance, and whether by design or not, they must rest on the partner whose faulty conduct has caused them; and he cannot require the partnership to contribute in any way towards them. (*l*) But a partner is not liable to his copartners for a loss

particular case. See Rowe *v.* Wood, 2 Jac. & W. 556.

(*k*) Crawshay *v.* Collins, 15 Ves. 226; Honore *v.* Colmesnil, 1 J. J. Marsh. 507, 541. Hence, when all the proprietors of a morning paper, save one, were also the owners of an evening paper, published in the same place, an injunction was granted to restrain the proprietors of the evening paper from publishing therein any information obtained at the expense of the morning paper, until it should first have been published in the morning paper. Glassington *v.* Thwaites, 1 Sim. & S. 124, 133. And if a copartnership own a dwelling-house which is occupied exclusively by the family of one of the partners, this partner is liable for rent to the firm, though there be no special agreement to that effect. Holden *v.* Peace, 4 Ired. Eq. 223. [So where a partnership owned a mine, together with houses and machinery, and the managing partner owned an adjoining mine and used the plant in working his own mine, it was held that he must account to the firm for the rental value of the property he used. Pierce *v.* Pierce, 89 Mich. 233, 50 N. W. 851.] The case of Beecher *v.* Guilbane, Mosley, 3, is thus reported: "If one copartner borrows money of the other on his note, he shall pay interest for it, though he had more money in the stock than what he borrowed; for the stock is only to be employed in augmentation of the trade, for their mutual benefit; but neither of them can make use of it for their own private advantage." See Kelley *v.* Greenleaf, 3 Story, 93; Roberts *v.* Totten, 13 Ark. 609; Pierce *v.* Daniels, 25 Vt. 624.

If one partner employ partnership funds in a private trade or adventure, he must account not only for the interest on the funds thus withdrawn from the partnership, but also for the profits of such separate trade. Brown *v.* Litton, 1 P. Wms. 140; Crawshay *v.* Collins, 15 Ves. 218; Stoughton *v.* Lynch, 1 Johns. Ch. 467; Solomon *v.* Solomon, 2 Ga. 18. And if such acts of one partner threaten the destruction of the joint property, or render it probable that the solvency of the firm and the rights of the creditors depend upon the interference of chancery, equity may interpose by injunction, even though a dissolution of the firm be not prayed for. Miles *v.* Thomas, 9 Sim. 607; Gratz *v.* Bayard, 11 S. & R. 41, 48. The same principles as to the use of the joint property apply to partners who wind up the affairs of the partnership after dissolution. See *post*, ch. 12, 13, upon the dissolution of a partnership and its effects.

(*kk*) Eason *v.* Cherry, 6 Jones, Eq. 261.

(*l*) Devall *v.* Burbridge, 6 W. & S. 529; Jessup *v.* Cook, 1 Halst. 434. See M'Ilreath *v.* Margetson, 4 Doug. 278; *In re* Webb, 2 J. B. Moore, 500; Lyles *v.* Styles, 2 Wash. C. C. 224. See Beste *v.* His Creditors, 15 La. Ann. 55. [So where a partner improperly pays an unjust bill, he and not the firm must be charged with

caused by an honest mistake of judgment, unless it amounts to gross negligence or ignorance. (*ll*)

The question may occur whether a negligence and consequent loss, in one respect, would be made up, or excused, by great successes and profit in another. It would perhaps be impossible to frame a definite rule which would govern all cases of this kind. The general principle would be something like this: If it were one transaction, quite indivisible, and the partner conducted it in some respects with a want of attention, which caused some loss, and in others with unusual care and skill and energy, which increased the profits, it could not be deemed on the whole a case of wrong demanding compensation. If, however, he had conducted throughout as he should have done, excepting in one or two particulars, and his default in these caused material injury, he should not be held excused for thus lessening the profits of the firm by the fact that they were still, on the whole transaction, very considerable. For the partnership is entitled to all its profits, and may ask compensation of any one whose wrongful act takes them or a part of them away, whether he be a partner or not, and whether much or little be left. And if there be many transactions, or one business divisible into many transactions, that he did his duty for the most part would certainly be neither excuse nor compensation for not doing it at all times. And we should doubt whether equity would find it easy to regard him as protected against all claims for default or violation of duty, because in certain things he did more than his duty. (*m*)

From the requirement of perfectly good faith, it follows that no partner must deceive his copartners, for his benefit and their injury, either by false representations or by concealments. Thus, if he persuades them into any course of business, or to any single transaction, by these means, and losses occur, he must sustain them or compensate for them. So, if he proposes to buy of them the whole or any part of their share of their business, and by any false statement or intimation on his part, or any concealment or prevarication, influences them to enter into an arrangement to effect his wishes, it will not be obligatory on them. (*n*)

the amount. Yetzer *v.* Applegate, (Ia.) 50 N. W. 66; Moore's Appeal, (Pa.) 19 Atl. 753.]

(*ll*) Morris *v.* Allen, 1 McCarter, 44; and see Stephens *v.* Orman, 10 Fla. 9. [Charlton *v.* Sloan, 76 Ia. 288, 41 N. W. 303.]

(*m*) See Pothier, Contr. de Soc. n. 125.

(*n*) Maddeford *v.* Austwick, 1 Sim. 89, is a leading case. The same principles are asserted and maintained in the cases of Sexton *v.* Sexton, 9 Gratt. 204, and Hopkins *v.* Watt, 13 Ill. 298; Knight *v.* Marjoribanks, 11 Beav. 322, 2 Macn. & G. 10. [Brooks *v.* Martin, 2 Wall. 70.

§ 152. **Partner Making Secret Advantage.** — If he makes any private bargain with third parties for his own benefit, which either inflicts a loss upon the partnership, or turns to himself advantages which belong to all in common, he will be held to make compensation for this, or to restore these advantages to the partnership in some way. (*o*) [1] Thus, if the partnership have a valuable leasehold property, and, when it is about to expire, a partner privately gets a renewal of it to himself, he cannot take advantage of this to impose hard terms on his partners, but will be held to have obtained it for them as well as for himself. (*p*)

So, if he obtains goods for the partnership by barter of his own goods, he cannot charge an extra price for his goods. If he is properly carrying on a separate business, he may charge a fair living price; so perhaps he may if he has them on hand in any way. But if he purchased them for this bargain with the partnership funds or credit, or if he for the partnership might have bought in the same way, he will be allowed to put upon them only the price he paid. (*q*) So if he acts in buying for his firm

(*o*) Fawcett *v.* Whitehouse, 1 Russ. & M. 132, 135, 141, 148; Hichens *v.* Congreve, 1 Russ. & M. 132, 150, note (*b*), 4 Russ. 562; also Carter *v.* Horne, 1 Eq. Ca. Abr. "Account," A., pl. 13; Russell *v.* Austwick, 1 Sim. 52; [Kimberly *v.* Arms, 129 U. S. 512.]

(*p*) Featherstonaugh *v.* Fenwick, 17 Ves. 298, 310; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, 69; Leach *v.* Leach, 18 Pick. 68, 76; Anderson *v.* Lemon, 8 N. Y. 236, 4 Sandf. 552. In Featherstonaugh *v.* Fenwick, *supra*, the Master of the Rolls said: "It is clear that one partner cannot treat privately, and behind the backs of his copartners, for a lease of the premises, where the joint trade is carried on, for his own individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership; and this renewal must be held to have been so obtained." The renewal, during a copartnership, of a lease held by a firm, and rendered more valuable by the business of the firm, though made by one partner to himself, and though it would not have been made to the firm, inures to the benefit of the firm. Mitchell *v.* Reed, 61 N. Y. 123; Struthers *v.* Pearce, 51 N. Y. 357.

(*q*) Burton *v.* Wookey, 6 Madd. 367. The plaintiff and defendant entered into partnership together to deal in *lapis calaminaris*. The defendant, who was a shopkeeper, was to take the active part in the concern, and to purchase the article from the miners in whose neighborhood he lived. After some time, the defendant adopted a course of dealing, by which, in place of paying the miners for the article

[1] So where a partner on whose recommendation the firm bought land received more land from the seller by way of commission, he took it in trust for the firm. Hodge *v.* Twitchell, 33 Minn. 389, 23 N. W. 547. So where in the course of selling firm property or of other partnership transactions one partner gets a secret commission from the purchaser, he will be required to hold it for the firm. Newell *v.* Cochran, 41 Minn. 374, 43 N. W. 84; Watts *v.* Patton, 66 Miss. 54, 5 So. 628; Whitman *v.* Bowden, 27 S. C. 53, 2 S. E. 630. The arrangement being fraudulent, one partner will not be allowed to maintain an action on a contract to pay such a secret commission. Gleason *v.* Chicago, M. & S. P. R. R. (Ia.) 43 N. W. 517.

a particular kind of goods which he also buys and sells on his own account, the firm are entitled to any profit he may make on his own goods sold to the firm. (*r*) And if, on the other hand, a partner gives the goods of the partnership in barter for something he buys, or otherwise uses them for his own benefit, he must allow the partnership the full market-price for them, or what any customer would have paid, unless the usage of the firm or their stipulations permit him to make his personal profit out of them.

§ 153. **How far Partner may transact Independent Business.** — It is quite well settled that a partner has no right to carry away his knowledge, his skill, his capital or credit, his care or labor, into another business, whether only his own or that of another firm, to the injury of his first copartners. That is, he may not do this such a way as to deprive them of business, of profits or advantages, which they had a right to expect from their connection with him. (*s*) As there is in practice no such thing as a uni-

with money, he paid them with shop-goods; and in his account with the plaintiff he charged him as for cash paid, to the amount of the price of the goods.

The question was, whether he could justify this charge, or whether he must not divide the profit made by him on the sale of the goods with the plaintiff.

The Vice-Chancellor said: "I must decree an account of the profit made by the defendant in his barter of goods, and must declare that the plaintiff is entitled to an equal division of that profit with the defendant."

(*r*) Bentley *v.* Craven, 18 Beav. 75. In this case the firm carried on the business of sugar-refiners. One of the members was a wholesale grocer, who had great knowledge of the proper time for buying sugars, and who, therefore, was selected as the buying agent of the firm. He bought sugars on his own account, in anticipation that the firm would need them; and, when they were required, sold them to the firm at the then market-price. It was held that the firm was entitled to any profit he might have made. But when a partnership is entered into for the purpose of transacting a commission business, — one to furnish buildings and fixtures, and the other to keep the books and give his personal attention to the management of the business, — the latter may, after the houses furnished by the former are full, and the former refuses to furnish further warehouseroom, put up other warehouses, and extend the business, to his own exclusive profit, provided he does not neglect the business of the firm. Parnell *v.* Robinson, 53 Ga. 26.

(*s*) See Boulay Paty, Cours de Droit, Com. tom. ii. 94. Sir John Leach said, in Glassington *v.* Thwaites, 1 Sim. & S. 131, 133, "The principles of courts of equity would not permit that parties bound to each other by express or implied contract, to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gave them a direct interest adverse to that undertaking." In Long *v.* Majestre, 1 Johns. Ch. 305, A. & B. carried on trade as partners, the capital being supplied by A. B. without the consent of A., and without rendering any account or dissolving the partnership, formed a new partnership with C., and carried into that house all the funds of the original firm, and used them therein till his death. The plaintiff filed his bill against the administratrix of B., and against C., his surviving partner, claiming to be entitled to the whole share of the deceased in the last partnership, alleging that a great part of

versal partnership, so no partner is obliged, by the mere fact of partnership, to do nothing else than the business of the partnership. It is probably not true in fact that the majority of partners confine themselves absolutely and exclusively to partnership business, or that it is expected or necessary that they should. (*t*) And it may be very difficult for a court to distinguish between the case of an honest several business, taking only its due share of time, capital, care, &c., and an instance of unlawful withdrawing from a partnership of what belongs to the firm.[1] But the line must be drawn somewhere; and courts have sometimes applied the rule with so much severity as to avoid transactions or compel compensation where the partner could not be charged with anything more than exposing himself to a bias in his own favor, and prejudicial to the partnership. (*u*)

the personal estate of the deceased had come into the hands of C.; and praying thatC. might be compelled to set forth a full and true account of the joint transtactions between him and the deceased, and of the personal estate of the latter in his hands. C. demurring to so much of the bill as called for the discovery and account above stated, the demurrer was overruled. And see Law *v.* Cross, 1 Black, 533; Soules *v.* Burton, 36 Vt. 652.

(*t*) See remarks of Willard, Vice-Chancellor, in Caldwell *v.* Lieber, 7 Paige, 483, 494, 495; Ship "Potomac," 2 Black, 481.

(*u*) Burton *v.* Wookey, 6 Madd. 367; *ante*, § 153, note (q). Sir John Leach there said: "It is a maxim of courts of equity that a person who stands in a relation of trust or confidence to another, shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence." But the mere fact that partners are so situated as to be under a temptation to improperly use the partnership property is not sufficient to induce equity to interfere by injunction. See Glassington *v.* Thwaites, 1 Sim. & S. 124.

The considerations applicable to the case of surviving partners, who are appointed executors of deceased copartners, will be suggested hereafter. *Post*, ch. 13.

[1] It is clear that if one partner carries on clandestinely the same business as that of the firm, the partnership is entitled to the benefit of any profit he may make. Todd *v.* Rafferty, 30 N. J. Eq. 254. But if the business carried on by the partner is of a different sort from that of the firm, and not connected with it, the firm has no claim to the profit. So where a partner in a warehouse owned a wharfboat, for the use of which he received fees from steamboats, it was held that his partners had no claim to the fees. Northrup *v.* Phillips, 99 Ill. 449. So where a partner in a firm of salt brokers engaged in the manufacture of salt, the firm cannot claim the profits of the manufacture, since there is no competition. Dean *v.* Macdowell, 8 Ch. D. 345 (C. A.). Even though the partner makes use in the new business of information acquired in the firm business, that does not give the firm a right to participate in the profits of the new business, where the information is not used for the purpose of competing with the firm business, and the new business is not in the same line as the old. Therefore a firm of shipbrokers was held not to be entitled to the profits of one partner who had joined a shipbuilding firm. Aas *v.* Benham, [1891] 2 Ch. 244 (C. A.). In the absence of agreement, one partner has no interest in an invention of his copartner, though made in the course of the partnership business and in business hours. Burr *v.* De La Vergne, 102 N. Y. 415, 7 N. E. 366.

§ 154. **How Accounts of the Firm should be kept.** — As all partners have these rights as against each other, so they have the right which these rights imply, — that of enforcing and protecting these rights; and especially of knowing whether they are invaded or not. Therefore, each partner has a perfect right to know all that is done, and examine all the accounts at his own pleasure. (*v*) So every partner is bound to enter upon the proper books and in the proper way, or enable the clerk or other person employed to make due entry of, every charge and every credit, all money paid or money received, and all notes payable or receivable, and every other transaction which is usually put upon the books of account; and all this he must do without unnecessary delay. (*w*) So, if any partner contemplates any important transaction, we should regard it as his duty to communicate what he does, and what he intends to do, before he takes any preliminary steps which might embarrass the firm if the transaction should not be carried into effect, in order that the firm may do what they think proper. If, by articles or arrangements, any one partner is intrusted with the accounts, it would be a peculiar breach of duty on his part to keep them in such way as to mislead his partners, whether by misentry or by nonentry. (*x*)

(*v*) Rowe *v.* Wood, 2 Jac. & W. 558; [Webb *v.* Fordyce, 55 Ia. 11, 7 N. W. 385; Katz *v.* Brewington, 71 Md. 79, 20 Atl. 139. This is especially true where the business is under the control of a managing partner. Fulmer's Appeal, 90 Pa. 143.] It is the duty of each partner to keep precise accounts, and to have them always ready for inspection. The good faith of the partners is pledged mutually to each other, that the business shall be conducted under their actual, personal inspection, enabling each to see that the other is carrying it on for their mutual advantage, and not destroying it. Peacock *v.* Peacock, 16 Ves. 49, 51; Donaldson *v.* Williams, 1 Cr. & M. 345; Rowe *v.* Wood, 2 Jac. & W. 553, 556. See Boynton *v.* Page, 13 Wend. 425.

(*w*) *Ex parte* Yonge, 3 Ves. & B. 36; Goodman *v.* Whitcomb, 1 Jac. & W. 589, 593; [Webb *v.* Fordyce, 55 Ia. 11, 7 N. W. 385.] Every reasonable presumption will be made against partners whose fault it is that the partnership books are imperfect; and if they claim to be entitled to other credits than those to which the books, at the close of the partnership, entitle them, it is usual to require of them very strict proof. Bevans *v.* Sullivan, 4 Gill, 383, 391; [Kirwan *v.* Henry, (Ky.) 16 S. W. 828; Van Ness *v.* Van Ness, 32 N. J. Eq. 669; Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73. But there is no presumption against a partner whose failure to keep proper accounts is shown to have been due to incapacity. Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.] In Beacham *v.* Eckford, 2 Sandf. Ch. 116, it was held, that, on the dissolution of a partnership between persons residing at different places, it is the duty of each partner to furnish to the other all their accounts, and to endeavor to adjust them to ascertain the balance; that this is especially the duty of the partner at the place where the principal business has been transacted; and that, upon the death of a copartner, this duty becomes imperative upon the survivor; and, if he neglect it, he will lose interest on the balance which may subsequently appear to have been due to him.

(*x*) See Maddeford *v.* Austwick, 1 Sim.

§ 155. **Partner's Right to Extra Compensation.** — Another point seems to be well settled, both at law and in equity. It is that no partner shall receive any special compensation for what he does, unless by agreement of the partnership. (*y*) If the articles, or an arrangement subsequent to them, provide that one or another shall receive any special compensation for special service, this arrangement will be respected. (*z*) But if there be no such provision,

89; Kelley *v.* Greenleaf, 3 Story, 93, 103. It is, of course, improper to blend the accounts of the partners with the firm with the individual accounts of the partners between themselves. Honore *v.* Colmesnil, 1 J. J. Marsh. 506, 517.

(*y*) Thornton *v.* Proctor, 1 Anst. 94; Whittle *v.* M'Farlane, 1 Knapp, 312, 315; Holmes *v.* Higgins, 1 B. & C. 74; Franklin *v.* Robinson, 1 Johns. Ch. 156, 165; Bradford *v.* Kimberly, 3 Johns. Ch. 431; Caldwell *v.* Lieber, 7 Paige, 483; Philips *v.* Turner, 2 Dev. & B. Eq. 123; Anderson *v.* Taylor, 2 Ired. Eq. 420; Reybold *v.* Dodd, 1 Harr. 401, 415; Dougherty *v.* Nostrand, 1 Hoff. Ch. 68; Bevans *v.* Sullivan, 4 Gill, 383; Coursen *v.* Hamlin, 2 Duer, 513; Roach *v.* Perry, 16 Ill. 37; King *v.* Hamilton, 16 Ill. 190; Bennett *v.* Russell, 34 Mo. 524; Drew *v.* Ferson, 22 Wis. 651. But, if a partner be appointed by the firm agent for a *special* purpose, he is entitled as against the firm to the usual compensation in relation to the subject of such agency. Bradford *v.* Kimberly, 3 Johns. Ch. 431; Philips *v.* Turner, 2 Dev. & B. Eq. 123. If, in winding up their affairs, the surviving partner renders services, not strictly in settlement, but in the prosecution and execution, of contracts already existing, or new ones entered into with the consent of the administrators of the deceased partner, for the general benefit of the partnership fund, he is entitled to compensation for such service as is not in strict settlement. Schenkl *v.* Dana, 118 Mass. 236; Willett *v.* Blandford, 1 Hare, 253. And if a partner sell half his share to another person, who becomes the general manager of the partnership business, such third party, not being a partner as respects the partner retaining his original interest in the firm, is responsible to the latter only as agent, and as against him may claim a reasonable compensation for his services. Newland *v.* Tate, 3 Ired. Eq. 226. A partner is, of course, entitled to be indemnified for outlays made by him, and obligations incurred, in the service of the partnership, and for the successful conduct of its business, though he cannot claim any thing for his management, time, and labor. Burden *v.* Burden, 1 Ves. & B. 170; Brigham *v.* Dana, 29 Vt. 1. And, it seems, there may be actual expenditures of money for the firm, by one partner, which partake so much of the nature of personal service that the court will not allow the firm to be charged with them, especially if the partner himself do not appear to have regarded them as items of expense incurred on partnership account. Thornton *v.* Proctor, 1 Anst. 94; *In re* The German Mining Company, 27 Eng. L. & Eq. 158. And if shareholders, or partners in such a company, at the request of the directors, the managing partners, make advances of money for partnership purposes, which are so applied, and are the means of saving the concern from ruin, and of preventing the total loss of the joint property, such shareholders are creditors of the company to the amount of their advances and interest thereon. *In re* The German Mining Company, 4 De G., M. & G. 19. See also *post*, § 157, note (*cc*).

(*z*) Paine *v.* Thacher, 25 Wend. 450; Desha *v.* Sheppard, 20 Ala. 747; Pond *v.* Clark, 24 Conn. 370. See Baltyde *v.* Trump, 1 Md. Ch. 517. And where by the articles of copartnership one partner is exempted from the duty of rendering his personal services to the joint business, if he afterwards does render such services, at the instance and request of his copartners, he will be entitled to a reasonable compensation therefor. The general rule, that one partner cannot charge the firm

the law will not make any, nor infer one from the greater industry or greater ability of any one partner. (*a*) The principle seems to be, that partners are considered as meeting on a common ground, each engaging to do all he can do for the common good. (*b*) And, whatever any one does, he has no claim for any thing beyond his equal share of the common benefit, without the consent of his copartners. (*c*) [1]

for his services, is founded on the principle that each partner is bound to devote his skill and labor to the promotion of the common benefit of the concern, and is inapplicable when the reason for it fails. Lewis *v.* Moffett, 11 Ill. 392. Upon the same ground, if partners agree to invest equal amounts of capital in the joint enterprise, and one partner advance more than his share, the partnership must allow him interest on the excess. Reynolds *v.* Mardis, 17 Ala. 32. If A. & B. enter into partnership under articles by which "A. bargains and agrees to give B. four hundred and fifty dollars to manage the business," B.'s salary is to be paid not by A. alone, but by the partnership, and out of the partnership funds. Weaver *v.* Upton, 7 Ired. 458. See Reynolds *v.* Mardis, *supra.*

(*a*) Philips *v.* Turner, 2 Dev. & B. Eq. 123. In this case the partnership business was under the almost exclusive superintendence of the partner making a claim for extra compensation. See Caldwell *v.* Lieber, 7 Paige, 483; *ante,* § 153, and Cunliffe *v.* Dyerville, 7 R. I. 325.

(*b*) The principle was very fully considered by Willard, V. C., in Caldwell *v.* Lieber, 7 Paige, 483, 495. He said: "Where there is no special agreement to that effect, partners are not entitled to charge each other for their services in the management of the concern; and the law never undertakes to settle between them their various and unequal services in the transaction of their private affairs." But if a partner refuses to discharge the duties he is bound to by the articles, he may be charged with their value in the account. Marsh's Appeal, 69 Pa. 30.

(*c*) Beatty *v.* Wray, 19 Pa. 516, 519. The rule is the same after the dissolution of the firm, by death or otherwise. Partners who wind up the concern are not entitled to any extra compensation for their time and labor. Burden *v.* Burden, 1 Ves. & B. 170; Stocken *v.* Dawson, 6 Beav. 371, 376; Beatty *v.* Wray, 19 Pa. 516; Lyman *v.* Lyman, 2 Paine, C. C. 11, 52.

[1] *Compensation of a partner.* — In the absence of special agreement, one partner can claim no compensation for his services. Ligare *v.* Peacock, 109 Ill. 94; Lee *v.* Davis, 70 Ind. 464; McBride *v.* Stradley, 103 Ind. 465, 2 N. E. 358; Taylor *v.* Ragland, 42 La. Ann. 1020, 8 So. 467; Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243; Frank *v* Webb, 67 Miss. 462, 6 So. 620: Gaston *v.* Kellogg, 91 Mo. 104, 3 S. W. 589; Coddington *v.* Idell, 29 N. J. Eq. 504; Lindsey *v.* Stranahan, 129 Pa. 635, 18 Atl. 524; Frazier *v.* Frazier, 77 Va. 775; Roots *v.* Mason City Salt Co., 27 W. Va. 483. And this is equally true, though the services of one partner are greater than those of the others. Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850. As where a partner winds up the business of the firm. Denver *v.* Roane, 99 U. S. 355; Shelton *v.* Knight, 68 Ala. 598; Tillotson *v.* Tillotson, 34 Conn. 335; Terrell *v.* Rowland, 86 Ky. 67, 4 S. W. 825; Sangston *v.* Hack, 52 Md. 173; Gregory *v.* Menefee, 83 Mo. 413; Brown's Appeal, 89 Pa. 139; Shriver's Appeal, (Pa.) 12 Atl. 553; Cothran *v.* Knox, 13 S. C. 496.

Where it is so agreed, one partner may have compensation for his services; and this agreement may be implied as well as express. Adams *v.* Warren, (Ala.) 11 So. 754; Weeks *v.* McClintock, 50 Ark. 193, 6 S. W. 734; Askew *v.* Springer, 111 Ill. 662; Lassiter *v.* Jackman, 88 Ind. 118; Sangston *v.* Hack, 52 Md. 173; Cramer *v.* Bachmann, 68 Mo. 310; Mann *v.* Flanagan, 9 Ore. 425. As by entries in the partnership books. Godfrey *v.* Templeton, 86 Tenn. 161, 6 S. W. 47.

Even if one partner is absent by reason of sickness, the other has no claim for

§ 156. **Interest on Advances.** — Upon the same principle, no partner is entitled to interest on moneys advanced to, or deposited with the firm, for its use, unless there be a special agreement to that effect. (*ca*) There is no established rule as to the allowance of

(*ca*) Lee *v.* Lashbrooke, 8 Dana, 214; Day *v* Lockwood, 24 Conn. 185; Desha *v.* Shepard, 20 Ala. 747; Tirrell *v.* Jones, 30 Cal. 655; Whitcomb *v.* Converse, 119 Mass. 38. If there is an agreement, interest is allowed with annual rests before dissolution, but without rests after, Barfield *v.* Loughborough, L. R. 8 Ch. 1, disapproving Pilling *v.* Pilling, 3 De G. J. & S. 162. But it is elsewhere held that, in taking account after dissolution, the articles allowing interest on capital, interest from that time and during the process of settlement is not to be allowed on each partner's capital contributed, Watney *v.* Wells, L. R. 2 Ch. 250; but otherwise, if there is no agreement for interest. Tutt *v.* Land, 50 Ga. 338. When profits are left in business, the partner leaving them does not draw interest, unless by express agreement. Dinham *v.* Bradford, L. R. 5 Ch. 519. Nor is a partner chargeable with interest on overdrawn profits. Maymott *v.* Maymott, 9 Jur. N. S. 496. Where by the contract partners agreed to keep one another in funds to a specified extent, and, on dissolution, one was found not to have contributed to the extent agreed, interest was allowed on the difference, to the partner whose advances were in excess of the others. Pim *v.* Harris, Ir. Rep. 10 Eq. 442. But *In re* German Mining Company, 4 De G. M. & G. 19, Knight Bruce, L. J., said: "I think that mercantile usage and the general course of trade dealings do, where a partner in trade has duly and properly advanced money of his own for the purposes of the partnership business, so as to become justly a creditor in account with the partnership for the amount, raise an implied contract for interest, so

compensation. It is one of the risks of the partnership, to which each partner is subject. Heath *v.* Waters, 40 Mich. 457. The same is true if one partner refuses to do his share of the work. Henry *v.* Bassett, 75 Mo. 89. But where one partner was employed elsewhere so that he could not give his time to the firm during nine months in every year, it was held that an agreement might be implied to pay the other partner compensation for his services during that time. Morris *v.* Griffin, (Ia.) 49 N. W. 846. And so where one partner left the country, leaving the other to wind up the business, the latter is entitled to compensation. Clement *v.* Ditterline, (Ky.) 11 S. W. 658. It might be reasonable, however, to require some evidence in addition to the mere fact of absence of one partner. The fact that before his admission to the firm one partner was employed in the business at a salary gives him no claim for compensation. Dunlap *v.* Watson, 124 Mass. 305.

It has been suggested that where the profits of a business are the result solely of the skill and labor of the partners, as in a professional partnership, a surviving partner might be entitled to compensation for his services in winding up the business. Denver *v.* Roane, 99 U. S. 355. If there is anything in this suggestion, it must of course be confined to the case of a surviving partner.

Where after dissolution of partnership, settlement in full of its affairs, and the death of one partner, the survivor, thinking the firm had a certain cause of action, prosecuted it successfully without the assistance of his copartner's representatives, and recovered a large amount of money, he was held entitled to compensation for his services. Zell's Appeal, 126 Pa. 329, 17 Atl. 647.

Where the managing partner employs his minor children in the work of the partnership, he is entitled to compensation for their services. Taylor *v.* Ragland, 42 La. Ann. 1020, 8 So. 467. Where a partner was by the articles to receive a salary for his services, it was held that he had no claim to it while he was sick and unable to render the services. Kinney *v.* Maher, 156 Mass. 252, 30 N. E. 818.

interest between partners. The circumstances of each particular case must determine. (*cb*) A partner is entitled to interest on advances although there was no express agreement to that effect, if it may be inferred from circumstances or their usage, that an allowance of interest was intended. (*cc*)

§ 157. **Rate of Interest.** — Interest payable by the terms of the contract at a greater rate than the law permits, except by special contract, is to be reckoned, after the maturity of the contract, at the rate fixed by the law, in the absence of express agreement. Thus, where the rate is six per cent, unless otherwise agreed, a note payable in one year at ten per cent interest draws but six per cent after the expiration of the year. (*cd*) [1]

§ 158. **How far Partners are Trustees.** — As a general principle, which will sometimes be of much use in determining the rights and obligations of copartners, it may be said that all partners are regarded somewhat as trustees for the firm.[2] We have already

as to entitle the partner advancing to have his account with the firm credited with interest accordingly, although his partners may not have authorized, and may not have known of the transaction; at least, in the absence of any express contract to the contrary." See *In re* German Mining Company, 27 Eng. L. & Eq. 158. [See *post*, § 417, n.]

(*cb*) Gyger's Appeal, 62 Pa. 73; Moss *v.* McCall, 75 Ill. 190.

(*cc*) Morris *v.* Allen, 1 McCarter, (14 N. J. Eq.) 44; Wood *v.* Scoles, L. R. 1 Ch. 369.

(*cd*) Brewster *v.* Wakefield, 22 How. 118; Eaton *v.* Boissoncault, 67 Me. 540; Burnhisel *v.* Firman, 22 Wall. 170; Ludwick *v.* Huntsenger, 5 W. & S. 51; Cook *v.* Fowler, L. R. 7 H. L. 27; Pearce *v.* Hennessy, 10 R. I. 223; Kitchen *v.* Bank, 14 Ala. 233; Lash *v.* Lambert, 15 Minn. 416; Hubbard *v.* Callahan, 42 Conn. 524; Searle *v.* Adams, 3 Kas. 315. See Cromwell *v.* County of Sac, 96 U. S. 51. See also *contra*, Brannon *v.* Hursell, 112 Mass. 63; Hand *v.* Armstrong, 18 Ia. 324; Marietta Iron Works *v.* Lattimer, 25 Ohio St. 621; Hopkins *v.* Chittenden, 10 Tex. 189; Pruyn *v.* Milwaukee, 18 Wis. 367; Etnyre *v.* McDaniel, 28 Ill. 201; Kilgore *v.* Powers, 5 Blackf. 22. But see Ayer *v.* Tilden, 15 Gray, 178.

[1] The rule stated in the text is supported by the weight both of authority and of argument. 1 Sedg. Dam. (8th ed.) § 325 *et seq.*; Goodchap *v.* Roberts, 14 Ch. D. (C. A.) 49; Holden *v.* Trust Co., 100 U. S. 72; Woodruff *v.* Webb, 32 Ark. 612; Cummings *v.* Howard, 63 Cal. 503; Jefferson County *v.* Lewis, 20 Fla. 980; Rilling *v.* Thompson, 12 Bush, 310; Brown *v.* Hardcastle, 63 Md. 484; McLane *v.* Abrams, 2 Nev 199; Ashuelot R. R. *v.* Elliot, 57 N. H. 397; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Thatcher *v.* Massey, 20 S. C. 542; Perry *v.* Taylor, 1 Utah, 63; and authorities cited in note (*cd*).

See, however, *contra*, Kerr *v.* Haverstick, 94 Ind. 178; Downer *v.* Whittier 144 Mass. 448; Warner *v.* Juif, 38 Mich. 662; Meaders *v.* Gray, 60 Miss. 400; Macon Co *v.* Rodgers, 84 Mo. 66; Kellogg *v.* Lavender, 15 Neb. 256; Wade *v.* Pratt, 12 Heisk. 231; Cecil *v.* Hicks, 29 Gratt. 1; Pickens *v.* McCoy, 24 W. Va. 344; and authorities cited in note (*cd*).

[2] "If fiduciary relation means anything, I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business

remarked that the law of partnership is a thing by itself; but, like every other branch of the law-merchant, and indeed of the

goes on." Bacon, V. C., in Helmore *v.* Smith, 35 Ch. D. 436, 444. See to the same effect, Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777; Rencher *v.* Anderson, 95 N. C. 208. "These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly created entity, the partnership, and for each member of the firm, who thus becomes a beneficiary under the trust." Stone, C. J., in Goldsmith *v.* Eichold, 94 Ala. 116, 10 So. 80.

Therefore where one partner buys in property belonging to the firm, as upon a sale on execution, he takes it for the benefit of the whole firm, not for himself individually. Railsback *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504; Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777; Jones *v.* Dexter, 130 Mass. 380; Devore *v.* Woodruff, 1 N. Dak. 143, 45 N. W. 701; Lamar *v.* Hale, 79 Va. 147. But see Helmore *v.* Smith, 35 Ch. D. 436 (C. A.); Rouquette *v.* Ryan (Ky.), 8 S. W. 702.

A partner for the same reason cannot buy up a claim against the firm. If he takes an assignment of such a claim he holds for the firm, and is entitled only to charge against the firm the amount he actually paid out. Easton *v.* Strother, 57 Ia. 506, 10 N. W. 877 (note); Catron *v.* Shepherd, 8 Neb. 308 (*chose in action*). This is true even if the firm has been dissolved. Filbrun *v.* Ivers, 92 Mo. 388, 4 S. W. 674. It is payment even as to third parties in the absence of some equity to keep it alive. Booth *v.* Farmers' & Mechanics' Nat. Bank, 74 N. Y. 228 (judgment).

For the same reason a partner cannot take a renewal of a firm lease for his own benefit; though he takes it in his own name he holds for the firm, even if there was no renewal clause in the original lease. Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Clegg *v.* Fishwick, 1 MacN. & G. 294; Clements *v.* Hall, 2 De G. & J. 173; Bell *v.* Barnett, 21 W. R. 119; Leach *v.* Leach, 18 Pick. 68; Struthers *v.* Pearce, 51 N. Y. 357; Mitchell *v.* Read, 61 N. Y. 123, 84 N. Y. 556. This seems to be true even after dissolution; for the chance of renewal may be a valuable asset of the partnership, in which the whole firm has a right to participate. Johnson's Appeal, 115 Pa. 129, 8 Atl. 36. And so where the renewal was taken during the continuance of the partnership though pending arrangements for dissolution. Sneed *v.* Deal, 53 Ark. 152, 13 S. W. 703. But where one partner died, and the survivor, without fraud, took a renewal, this was held not to benefit the estate of the deceased partner; the fiduciary relation, like the partnership, ceased with the partner's death. Chittenden *v.* Witbeck, 50 Mich. 401, 15 N. W. 526.

The same rule applies where one partner obtains any benefit through the partnership which in equity the firm should have. Thus where a partner insured firm property in his own name he was required to account to the firm for the insurance money. Tebbetts *v.* Dearborn, 74 Me. 392. And where a partner contributed an invention as his capital, and then took out a patent on it in his own name, he held the patent in trust for the firm. Hill *v.* Miller, 78 Cal. 149, 20 Pac. 304.

Where a partner buys property with the funds of the firm, and takes title in his own name (or in that of his wife), he will be held a trustee for the firm. Helmore *v.* Smith, 35 Ch. D. 436 (C. A.); Kayser *v.* Maugham, 8 Col. 339, 7 Pac. 286 (*semble*); Renfrow *v.* Pearce, 68 Ill. 125; Holdredge *v.* Gwynne, 18 N. J. Eq. 26; Partridge *v.* Wells, 30 N. J. Eq. 176.

A partner in acting beyond the scope of the business is not acting in a fiduciary capacity. Wheeler *v.* Sage, 1 Wall. 518. As for instance in buying the share of another partner in the firm. Cassels *v.* Stewart, 6 App. Cas. 64. Or in buying in on foreclosure the mortgaged individual share of another partner in the firm real estate. Rouquette *v.* Ryan (Ky.), 8 S. W. 702. And so ordinarily the fiduciary relation ceases upon dissolution. Consequently one has no claim to participate in a purchase made

law in general, it is connected, by many relations and analogies, and many common principles, with collateral branches; and these it is often useful to consider. Thus the law is well settled in regard to trustees. A wisely adjusted system of right and obligation guides the trustee, preserves the property or interests in his hands, and protects both him and the *cestui que trust;* him from all undue interference and molestation while faithfully discharging his duty, and the *cestui que trust* from all injurious breach of duty. Now, a copartner has powers, opportunities, and duties, in relation to the partnership, very similar to those which a trustee has in relation to his *cestui que trust.* And, so far as they are similar, it has been repeatedly held that the same rules and principles are applicable to them, both in law and in equity. (*d*)

SECTION VI.

INTERPRETATION OF PARTNERSHIP AGREEMENT.

§ 159. **Articles of Copartnership.** — It would be very possible for persons to enter into partnership with no articles, and no agreements whatever, excepting the bare agreement to become partners. Then the law would provide for them a set of rules and arrangements which would cover nearly the whole ground, and would probably be much the same with those agreed upon by parties in most cases. But generally, if not always, the parties themselves enter into some definite and special bargains or terms, which are to be taken as the foundation of their partnership. Sometimes these are agreed upon only orally, and sometimes they are expressed in writing. It does not seem that there is any difference in their effect and operation, whether spoken or written, if only they are ascertained; (*e*) but there is

(*d*) See the remarks of Story, J., in Kelley *v.* Greenleaf, 3 Story, 93, 101. Surviving partners are trustees for certain purposes. See *ante*, § 154, note (*u*).

(*e*) It might be one advantage of having a *deed* of partnership, that an action of covenant can be maintained for a breach of the stipulations in it, which would be binding on the representatives of the contracting parties in the same manner and to the same extent as other specialty obligations.

after dissolution by his former copartner, though it was connected with the firm business. Kennedy *v.* Porter, 109 N. Y. 526, 17 N. E. 426.

There is no fiduciary relation between mining partners. Harris *v.* Lloyd, 11 Mont. 390, 28 Pac. 736; Lamar *v.* Hale, 79 Va. 147.

much difference in respect to the evidence of the agreement; for the only way to be reasonably certain of the terms of a bargain is to reduce it to writing at the time, and, as a matter of precaution, have it verified by the signatures of all who are interested in it. (*f*)

§ 160. **Special terms bind Partners only** — In regard to the articles of copartnership, the two most general principles have already been stated. They are, first, that the law permits partners to enter into any arrangements or engagements between themselves which are not void as against statutory provisions or the general principles of law. These may conflict with any or all of the especial rules of the law of partnership, but will be none the less binding upon the parties themselves. Thus, if A., B., & C. choose to enter into partnership, and agree that A. shall keep all the accounts, and that neither B. nor C. shall ever see them without his permission; or that A. alone shall sign the name of the firm; or that he shall share the profits, but not share any loss;(*g*) any or all of these agreements would be binding on the parties.

The second general rule is, as already stated, that these special arrangements or bargains are not binding or operative upon any third parties who are not especially informed of them, and subsequently enter into transactions in acknowledgment of them. (*h*) The general rules of law, and the special rules of the law of partnership, every person is presumed to know, and cannot ground a

(*f*) The importance of written articles, by which the courts may be guided in determining all questions in which the partnership or the several partners are interested, and especially as to the method of winding up the affairs of the joint concern upon a dissolution, is strongly enforced by Lord Eldon in Crawshay *v.* Collins, 2 Russ. 341, 343.

(*g*) See North British Bank *v.* Collins, 28 Eng. L. & Eq. 7.

(*h*) Sandilands *v.* Marsh, 2 B. & Ald. 697: Smith *v.* Jameson, 5 T. R. 601, 603; Craven *v.* Widdows, 2 Ch. Ca. 139; Hawken *v.* Bourne, 8 M. & W. 703, 710; Tradesmen's Bank *v.* Astor, 11 Wend. 87, 90; Tillier *v.* Whitehead, 1 Dallas, 269; Devin *v.* Harris, 3 Greene, (Ia.) 186; Nichols *v.* Cheairs, 4 Sneed, 229; [Irwin *v.* Williar, 110 U. S. 499; Gruner *v.* Stucken, 39 La. Ann. 1076, 3 So. 338.] The proposition of the text is frequently illustrated by cases in which it has been stipulated that some one or more of the partners shall not have the power of putting the firm name to negotiable paper. If notwithstaning such stipulation, the prohibited partners do exercise this power, the partnership is bound, unless knowledge of such prohibition, actual or constructive, can be fixed upon the party taking the paper; and it makes no difference that the stipulation be made in favor of a dormant partner. Winship *v.* Bank of United States, 5 Mason, 176, 5 Pet. 529; Grant *v.* Hawkes, Chitty on Bills, 42; South Carolina Bank *v.* Case, 8 B. & C. 427; Smith *v.* Lusher, 5 Cow. 689, 710; Walden *v.* Sherburne, 15 Johns. 409; Whitaker *v.* Brown, 16 Wend. 505, 508; Bank of Rochester *v.* Monteath, 1 Denio, 402, 406; Gano *v.* Samuel, 14 Ohio, 592; Bank of Kentucky *v.* Brooking, 2 Litt. 41; [Bates *v.* Forcht, 89 Mo. 121, 1 S. W. 120;] *ante*, § 83.

right or a defence upon his ignorance of them. But no one is presumed to know those private arrangements, and no one is therefore affected by them until they are brought home to his knowledge.

§ 161. **General Principles of Construction.** — There remain to be considered the rules and principles which courts apply to the construction of partnership articles. In the first place, so far as the articles contain provisions which the law would create between the partners if the articles did not, they might be regarded as surplusage. But if any question arose as to the bearing, application, or exact effect of these rules, great regard would be paid to the intention of the parties as it was expressed in their articles. (*i*)

(*i*) Gainsborough *v.* Stork, Barnard. Ch. 312. General language used in one place will sometimes be construed to run through and pervade the whole body of the articles. Thus, the words of covenant generally occurring at the commencement of a partnership deed, usually declare the covenant to be joint and several; and words of covenant subsequently occurring in the instrument are on that account usually construed to be intended to be also joint and several. But it is to be borne in mind that, whatever may be the form of a covenant, if the interest and cause of action be joint, the action must be by all the covenantees, and, on the other hand, if the interest and cause of action be several, the action may be by one. Hence, notwithstanding the rule of construction we have just stated, where the covenant, introductory to a partnership deed, is declared to be joint and several, some of the covenants in the instrument may be such that the partner committing a breach can be sued only by all the rest jointly, while for the breach of others a several action by one of the partners may be maintainable, Eccleston *v.* Clipsham, 1 Saun. 153. See Owston *v.* Ogle, 13 East, 538; Servante *v.* James, 10 B. & C. 410.

There may be single and particular provisions in partnership articles, which, from change of circumstances, lapse of time, or in other ways, have come to be entirely inconsistent with and contradictory to the whole scheme and tenor of the agreement. In such case, a court of equity regarding the general object and purpose of the parties as superior to and controlling any lesser and subordinate intent, will refuse to carry into effect the minor and inconsistent stipulation. See this illustrated with respect to the clause giving to two-thirds of the partners the power to expel a member of the firm. Blisset *v.* Daniel, 11 Hare, 493. See also *Ex parte* Croxton, 1 De G. M. & G. 600, as to the construction of apparently inconsistent stipulations respecting the liabilities of a retiring partner.

When a partnership consists of very many partners, as in a joint-stock company, the partners are to be held, as strictly as may be, to the terms of association. Lawes's Case, 1 De G. M. & G. 421.

In the construction of partnership articles, Lord Eldon said, in Greddes *v.* Wallace, 2 Bligh, 295: "You are to take the whole instrument together, and you are not only to look at the whole of the instrument together, but you are to look at the transactions of the parties; for, whatever may be the language of a partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in that deed were not to be considered as rules which should regulate the rights and duties of the partners." And partnership articles are read in a court of equity as not containing the clauses on which the parties have not acted. Lord Eldon in Jackson *v.*

If any of the rules of partnership law are not interfered with by the articles, — that is, if the articles are silent on any points established by the law, — it will be presumed that the parties intended that the right given and the duties imposed by the law in these respects suited them perfectly, and all such rules of law will be enforced in the same manner as if they entered into the articles. (*j*)

§ 162. **Bill for Specific Performance of Articles.** — Most of the questions litigated under articles of partnership come before courts of equity; nor is there any doubt as to the full jurisdiction of equity over these articles, or any general difference between the principles which equity applies to questions of partnership and those applicable to other questions of an analogous character. (*kk*)

A very frequent prayer of a complainant in equity is for a decree for a specific performance. This prayer the court will hear in some form, whether the act required is demanded by the articles, or is a legal obligation created by the law; and will grant, as in ordinary cases, provided the contract or duty be clearly made out, and there is no waiver on the complainant's side, or no breach on his part justifying that of which he complains; and provided the performance prayed for is practicable, remedial, and just, as between the parties, and not injurious to third parties. But one principle, which often prevents this decree in ordinary cases, is frequently applicable in partnerships. It is this: A partner may bind himself by articles, to be honest, diligent, skilful, &c., and is bound by law to be the first perfectly, and the others as far as the exigencies of the partnership require and his capacity permits. And any breach of these obligations, actual or intended, equity will prevent by injunction, if that suits the case, or apply any other proper remedy. But no specific performance can be decreed; for it is difficult, not to say impossible, to draw an exact defining line, and say how industrious or skilful a partner shall be, or how he shall prove his honesty. But if his fraud, his negligence, or his ignorance threaten an actual mischief which the court can prevent, or have caused one for

Sedgwick, 1 Swanst. 469. But the topic of the waiver of partnership articles will be separately considered hereafter. *Post*, § 164.

(*j*) In Crawshay *v.* Collins, 15 Ves. 218, 226; Lord Eldon said: "Partnerships are regulated either by the express contract, or by the contract implied by law from the relation of the parties. The duties and obligations arising from that relation are regulated, as far as they are touched by the express contract; if it does not reach all those duties and obligations, they are implied and enforced by the law." Smith *v.* Jeges, 4 Beav. 503, 505. See Jackson *v.* Sedgwick, 1 Swanst. 469.

(*kk*) Whitman *v.* Robinson, 21 Md. 30; Homfray *v.* Fothergill, L. R. 1 Eq. 567; Ibbotson *v.* Elam, L. R. 1 Eq 188.

which he can make compensation, the aid of the court will then be given. We have mentioned this subject here, as it seemed necessary to notice it in connection with the articles of copartnership; but shall treat of it more fully hereafter, when considering the general subject of the equitable processes and remedies between partners. (*k*)

§ 163. **Specific Performance of Agreement to form Partnership.** — Equity is sometimes called upon to decree a performance of an agreement to enter into partnership. There can be no doubt whatever of the perfect competence of the court to make such a decree, if they see fit. (*l*) But there are so many possible objections to it, that, in point of fact, it very seldom is made or asked for. If the agreement is for a term of time, a court would hesitate before it compelled parties to enter a relation of long endurance, in which it is, above all things, necessary that there exist entire mutual confidence and the most unembarrassed co-operation; although there are undoubtedly, instances of this, enough perhaps to constitute a general rule. (*m*) If, on the other hand, no term of time is fixed by the agreement, it would be merely nugatory for equity to decree a partnership which the reluctant partner might terminate the moment after. (*n*) It is easy, however, to suppose cases where a person had made arrangements with a view to a partnership distinctly agreed upon, which would now bring upon him great loss and mischief, if that part-

(*k*) *Post*, § 205.

(*l*) Buxton *v.* Lister, 3 Atk. 383; Anonymous, 2 Ves. Sen. 630; Birchett *v.* Bolling, 5 Munf. 442; 2 Story Eq. § 718; Adderly *v.* Dixon, 1 Sim. & S. 610, 611. See further the opinion of Wilde, J., Clark *v.* Flint, 22 Pick. 231, 239. The specific performance of an agreement for a partnership may be enforced by compelling the parties to execute the proper partnership deed. Hibbert *v.* Hibbert, Collyer on Part. § 203; England *v.* Curling, 8 Beav. 129. So a court of equity may compel a partner to contribute the sum stipulated as capital, or to restore it to the common fund, if he have withdrawn it before the debts are paid. Robinson *v.* McIntosh, 3 E. D. Smith, 221.

(*m*) See cases cited in last note; Anonymous, 1 Madd. Ch. (3d ed.) 525. See Van Sandan *v.* Moore, 1 Russ. 441, 463; Birchett *v.* Bolling, 5 Munf. 442; England *v.* Curling, 8 Beav. 129; Manning *v.* Wadsworth, 4 Md. 59.

Though the court decree the specific performance of an agreement to let the plaintiff into a trade, it seems, it will not direct an account of the profits from the time the plaintiff ought to have been admitted; his remedy, in that respect, being complete at law. Anon., 2 Ves. Sen. 630. *Sed qu.*

(*n*) In Hercy *v.* Birch, 9 Ves. 357; 2 Hov. Supp. 174, Lord Eldon refused to enforce specifically an agreement for a partnership without limitation of time, observing: "No one ever heard of this court executing an agreement for a partnership, when the parties might dissolve it immediately afterwards." It has been said, that Lord Eldon was not quite satisfied with this decision. 1 Madd. Ch. (3d ed.) 525, n. 1. In Buxton *v.* Lister, 3 Atk. 383, and Anon., 2 Ves. Sen. 629, no difference, in this particular, between partnerships for a term and those without limitation of time, seems to have been adverted to.

nership did not at least begin to be. There may have been an actual partnership for a time, and then one of the partners refuse to consider himself partner under the articles, or to allow them any force, to the great detriment of the other. In any such case, there can be no reason why a court of equity should not decree a partnership. And we apprehend that a partnership might thus be formed by order of court, to be dissolved at once at the pleasure of one party, but yet substantial justice be done by clothing the parties with the obligations and the rights which result from a partnership, however brief it may be. (*o*) If it were necessary, we know not why equity may not decree a partnership as of a past day, if justice required this, by the application of that familiar principle, that equity will consider that as actually done which certainly ought to have been done.

Another general objection to a decree that certain persons should become partners is, that it can seldom be necessary. Damages may be recovered at law for a breach of the contract, in an action of assumpsit, which is itself a kind of equitable action; and, generally, these may be estimated on principles which would make them fully compensative. Indeed, they may be recovered at law in some cases in which equity would refuse a specific performance, on the ground that it would be ineffective and useless. (*p*) It must be remembered, however, that this action is not maintainable at law, unless the particulars of the agreement on the one hand, and of the breach on the other, can be distinctly proved. (*q*) If the agreement is under seal, then covenant will

(*o*) Mr. Swanston, in his note to Crawshay *v.* Maule, 1 Swanst. 513, alluding to the distinction taken between executory contracts of partnerships to last for a term, and those without such limitation of time, with reference to their being specifically enforced, remarks: "This distinction, however, must be received, it is presumed, not without qualification. In many such cases, though the partnership could be immediately dissolved, the performance of the agreement (like the execution of a lease after the expiration of the term, see Wilkinson *v.* Torkington, 2 Y. & Col. 726) might be important, as investing the party with the legal rights for which he had contracted." See Downham *v.* Mathews, cited in 1 Ves. Sen. 497, 499. If justice require it, under special circumstances, the court will decree a specific performance, though generally not. Scott *v.* Rayment, L. R. 7 Eq. 112.

A court of equity, in some cases, may inhibit a partner from dissolving the firm. Chavany *v.* Van Sommer, cited in 3 Wood. Lec. 416, n.; also, in Crawshay *v.* Maule, 1 Swanst. 511, note; Ramsbottom *v.* Parker, 6 Madd. 5.

(*p*) M'Neil *v.* Reid, 9 Bing. 68, 2 Moore & S. 89. See Manning *v.* Wadsworth, 4 Md. 59.

(*q*) Figes *v.* Cutler, 3 Stark. 139. Compare this with M'Neil *v.* Reid, 9 Bing. 68. See Gale *v.* Leckie, 2 Stark. 107, 108; Vance *v.* Blair, 18 Ohio, 532. It is a sufficient consideration for a promise to admit a stranger into a firm, that the latter will become a partner. Byrd *v.* Fox, 8 Mo. 574.

lie. Here, however, as appears by the only case of the kind that we are aware of, the question of priority of covenants and priority of breach may be very material. For if the plaintiff has failed to do something obligatory on his part and tending towards the partnership, this may furnish an adequate excuse to the defendant. (*r*)

§ 164. **Waiver of Provisions in the Articles.** — The provisions agreed upon by the parties, whether orally or in writing, may be waived by them, or modified in any way they please. And courts of equity will sometimes imply such waiver or modification from facts. Thus, it is an established rule that provisions in the articles which the partners have never acted upon, but for a sufficiently long time have wholly disregarded, will be considered as expunged. (*s*) If there is only silence and neglect from which to infer this, they must be long continued, and such as not to be fairly open to any other explanation than that the parties understood the provision thus disregarded to have no force. If the silence or non-observance be brief, but these are strengthened by acts of the partners opposite in their nature and effect to those provisions, and not to be reconciled with any regard to them, the same inference will be made. (*t*) It is equally true that no one partner has a right to violate the provisions, and that all the partners together have a right to annul or amend them. And if one partner violate them and the rest follow his example, or without doing the same thing, approve by word or act of what he does, or, perhaps, if they do not oppose it, here would be evidence of a new agreement.[1]

(*r*) Walker *v.* Harris, 1 Anst. 245. See 1 Wms. Saund. 320, n. 4; Glover *v.* Tuck, 24 Wend. 153; Morrow *v.* Saunders, 1 Br. & B. 318.

(*s*) Partners, if they please, may, in the course of the partnership, come to any new arrangement, for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners. England *v.* Curling, 8 Beav. 129, 132. See Solomon *v.* Solomon, 2 Ga. 18; Lord Eldon in Jackson *v.* Sedgwick, 1 Swanst. 460, 469; Boyd *v.* Mynatt, 4 Ala. 79. See Smith *v.* Chandos, Barnard. Ch. 419; *ante*, § 161, note (*i*).

(*t*) In Const *v.* Harris, Turner & R. 523, Lord Eldon said: "In ordinary partnerships, nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct." Jackson *v.* Sedgwick, 1 Swanst. 460, 469. See McGraw *v.* Pulling, 1 Freeman Ch. 357, 371.

[1] Where the language of the articles is ambiguous, the construction placed upon it by the partners themselves as shown by their course of dealing is of great, if not of

On one point the courts seem to construe articles quite strictly; and that is in relation to any material change or enlargement of the business; for this they require an unanimous consent. We apprehend that no courts would now give this power to a mere majority. (*u*)

§ 165. **Renewal of Partnership.** — It happens quite often that a partnership, limited by the articles to a certain time, continues after that time, and is carried on by the same parties in much the same way, with no new articles, and no formal notice or renewal of the old ones. The question may then arise, as to the effect of the articles upon the new firm under these circumstances. The answer must depend mainly on the conduct of the parties. If they go on precisely as before, or in such a way as to indicate no intentional departure from such a course, the provisions of the former articles would be held to be those of the present partnership, excepting such, if any there were, as were plainly inapplicable to the present state of things. (*v*) On the other hand, if the firm varied or departed from these provisions, or appeared to adopt new ones, they would be considered as making, so far, a different bargain from the old ones. It should be noticed, however, that a partnership, silently continued upon old articles, is dissolvable at the will of either partner, although those articles contain a distinct limitation of time. (*w*) The renewal of this limitation of

(*u*) Natusch *v.* Irving, Gow on Part. App. 398; *ante*, § 131. Respecting the rights of a majority, see *ante*, § 148.

(*v*) "We know, that after the expiration of the time at first agreed upon, partnerships frequently continue without a new agreement; and the effect of that is, that the partners, after the expiration of the partnership term, continuing to carry on the trade without a new deed, all the old covenants are infused into the new series of transactions." Per Sir Anthony Hart, in Booth *v.* Parks, 1 Molloy, 466; Crawshay *v.* Collins, 15 Ves. 218, 228; Bradley *v.* Chamberlin, 16 Vt. 613; Mifflin *v.* Smith, 17 S. & R. 165. In United States Bank *v.* Binney, 5 Mason, 176, 185, Mr. Justice Story, stating the doctrine on this point, said: "The articles expired by their own limitation, in two years; and had force no longer, unless the parties elected to continue the partnership on the same terms. That is matter of evidence upon the whole facts. The natural presumption is, that, as the partnership was continued in fact, it was continued on the same terms as before, unless that presumption is rebutted by the other circumstances in the case. There is no written agreement respecting the extension of the copartnership, and therefore it is open for inquiry upon all the evidence."

(*w*) Booth *v.* Parks, 1 Molloy, 466; Featherstonaugh *v.* Fenwick, 17 Ves. 298.

controlling, weight. Meguiar *v.* Helm, (Ky.) 14 S. W. 949; Winchester *v.* Glazier, 152 Mass. 316, 25 N. E. 728; Rathbun *v.* McConnell, 27 Neb 239, 42 N. W. 1042.

A modification of the articles may be shown by a long course of dealing indicating mutual consent to the change, even if there is no other evidence. Weeks *v.* McClintock, 50 Ark 193, 6 S. W. 734; McCall *v.* Moss, 112 Ill. 493. As by entries in the books of the firm, to which all partners had access. Gregg *v.* Hord, 129 Ill. 613, 22 N. E. 528; Southmayd's Appeal, (Pa.) 8 Atl. 72.

time would seldom be presumed from acts, or sustained by the law as a part of a new bargain, on any thing less than proof that the parties had expressly so agreed. (*x*) [1]

The articles sometimes provide for a continuance of the partnership after the death of one or more partners. This is much more common in England than here; but is not unknown here, and such provisions may give rise to difficult questions. These, however, we shall consider when we treat of dissolution by the death of a partner.

§ 166. **Provisions for Advances by a Partner.** — The articles of partnership not unfrequently contain agreements that one or all

(*x*) The original articles of a copartnership provided that it should last seven years. At the end of that time, the defendants, who resided in this country, transmitted to the complainant in London (where he resided) the partnership articles, with an indorsement of a renewal of them for another term of seven years, to commence from the expiration of the last. The complainant, in his answer to the defendants' letter, enclosing the renewal, said that he would agree to it if he were relieved from his difficulties on the arrival of the ship "Carolina." The "Carolina" did arrive, and both complainant and defendants went on with the business in the same manner as had been done while the original articles were in force. But the complainant never made any formal renewal of the articles. The defendants therefore contended that the partnership which continued was not for seven years, but was determinable at will. The court held otherwise, and considered that the complainant's resumption of his duties as a partner on the original terms was a substantial renewal of the articles on his part, and was such an assent to the written renewal of them by the defendants as would be binding on him, if the defendants had insisted upon it. Dickinson *v.* Bold, 3 Desaus. 501. The written articles of partnership, including the arbitration clause, continue in force, so far as applicable, when the partnership is continued beyond the term limited by the articles. Gillett *v.* Thornton, L. R. 19 Eq. 599; Parsons *v.* Haywood, 31 Beav. 199. But special and unusual provisions of a penal nature will not be considered as in force after the expiration of the term. Clark *v.* Leach, 8 L. T. N. S. 40. A stipulation, in partnership articles, that neither shall sell his interest without the consent of the others, has no application after a dissolution, and the appointment of a receiver. Noonan . McNab, 30 Wis. 277.

[1] Where a business is continued after the time for which the partnership was formed has elapsed, it is presumed, in the absence of circumstances showing a different arrangement, to be upon the old terms. Neilson *v.* Mossend Iron Co., 11 App. Cas. 298; Cox *v.* Willoughby, 13 Ch. D. 863; Haynes *v.* Short, 88 Ala. 562, 7 So. 157; Sangston *v.* Hack, 52 Md. 173. But the continuing partnership is at will, and such provisions of the articles as are inconsistent with a partnership at will cease to be in force. Neilson *v.* Mossend Iron Co., 11 App. Cas. 298; Cox *v.* Willoughby, 13 Ch. D. 863. So where one of the articles provided for dissolution and disposition of the assets after three months' notice by a partner, it was held that this article was not in force after the original term of partnership, and the partnership might be dissolved at will. Neilson *v.* Mossend Iron Co., 11 App. Cas. 298. Where the articles provide that upon the death of a partner the survivor may take the business on payment of a certain sum to the representatives of the deceased, the better view would seem to be that the provision, not being inconsistent with a partnership at will, continues in force after the expiration of the limited term of partnership. Cox *v.* Willoughby, 13 Ch. D. 863; but see Yates *v.* Finn, 13 Ch. D. 839.

of the partners should pay into the capital stock of the firm certain moneys, at certain times and on certain terms. Any partner is considered, as to any such obligation, merely as a debtor to the firm; and his rights and his responsibilities are the same with those of any other debtor. (*y*) This is carried so far, that, where two had agreed to pay large sums, through a considerable period, to one, in consideration that he would take them into partnership, and this one became bankrupt soon and before most of the sums were paid, it was held that his assignees were entitled to those instalments. (*z*) [1] If, however, a partner owes money to the firm, on any ground, he may refuse to pay it if the other partners, also owing money to the firm, refuse to pay. The reason of this is simply, that the first partner claims in substance that a balance is due to him, or would be due if all the partners paid the charges against them, or that his debt would be diminished; and, where such a claim is made in good faith, he cannot be compelled to pay, unless they pay. (*a*)

In general, where a sum of money is advanced to a partner, or a partner is permitted to take it as a loan, and there are no

(*y*) A partner, by failing to contribute his share of the partnership fund, does not in ordinary cases forfeit the interest which he already has in the firm, especially if no extraordinary emergency require the payment. Piatt *v.* Oliver, 3 McLean, 27. See Patterson *v.* Ware, 10 Ala. 444; Turnipseed *v.* Goodwin, 9 Ala. 372. And one partner, after accepting the money and services of another, shall not, when called upon to carry out the partnership, be permitted to deny that any joint interest ever existed, because the other partner has failed to furnish as much money for partnership purposes as he agreed to. Stein *v.* Robertson, 30 Ala. 286. The means which partners may employ to enforce their rights, when any one partner neglects to contribute his proper quota to the joint fund and the launching of the partnership, will be more appropriately considered when we treat of the remedies of partners between themselves. *Post*, § 191.

(*z*) Akhurst *v.* Jackson, 1 Swanst. 85, 89. Per the Master of the Rolls: "In almost all partnerships, a loss follows the bankruptcy of any of the partners; a thousand instances must have occurred of loss by bankruptcy in circumstances similar to the present, yet no precedent is produced of the interposition of a court of equity. The reason is evident. The loss is not a breach of the contract, but a contingency subject to which the parties purchased. The defendants bought the right of becoming partners; they became partners; the partnership ended by an event by which it was, in its nature, liable to be determined. . . Upon a division, the whole price became, according to the terms of the agreement, *debitum in præsenti*, although *solvendum in futuro*. In equity, as well as at law, the contract has been performed, and the consideration must be paid."

(*a*) Foster *v.* Donald, 1 Jac. & W. 252; Richardson *v.* Bank of England, 4 Myl. & C. 171.

[1] Where it is agreed that one shall pay a premium to another upon being admitted into partnership, he must pay the premium though he decides not to enter into the partnership. Bluck *v.* Capstick, 12 Ch. D. 863.

express terms agreed on, his profits are in the first place answerable; and, if they are insufficient, his share of the stock goes to discharge this balance; and, if that be insufficient, he becomes a personal debtor for the balance. (*b*)

§ 167. **Provisions as to Accounts.** — The articles sometimes contain provisions as to the accounts, how they shall be kept, or how settled; and these provisions also are protected by law, but only so far as justice will permit. (*c*) Thus, it may be provided that accounts once settled shall not be reopened but for fraud discovered; and yet a material error, through gross negligence, would undoubtedly be corrected in equity. It is prudent to guard settled accounts from too easy or too hasty reconsideration; and not only will the courts enforce reasonable provisions made for this purpose, but equity would not permit settled accounts to be reopened without good and certain cause, even where there was no such provision. (*d*) On the other hand, if it be agreed that no accounts between the partners which have once been closed shall be reopened after the death of any party to them, it is clear that equity would reopen them on proof of fraud, either by the deceased partner or against him. (*e*) The articles may also provide a

(*b*) Crawshay *v.* Collins, 2 Russ. 325, 347, per Lord Eldon.

(*c*) In the absence of special stipulations, the rule is that the accounts must be taken in the usual way. Jackson *v.* Sedgwick, 1 Swanst. 469. The duty of each and all of the partners to keep proper books of account, always ready for inspection, we have already considered. We have also seen that partners may waive any of the provisions of the partnership deed, and that they may do this not only by express agreement, but by conduct in opposition, or without regard to, the articles. The doctrine is as applicable to stipulations respecting the joint accounts, the mode and time of balancing them, &c., as to any other. Pettyt *v.* Janeson, 6 Madd. 146; Jackson *v.* Sedgwick, 1 Swanst. 460. When a new partnership is formed, for the purpose of transferring property to it, so that it cannot be attached by the creditors of a former firm, a partner in the new firm may maintain a bill for an account, notwithstanding one of the objects of the formation of the firm was to delay, hinder, and defraud creditors. Harvey *v.* Varney, 98 Mass. 118.

(*d*) Gainsborough *v.* Stork, Barnard. 312. See Stoughton *v.* Lynch, 2 Johns. Ch. 218; Roberts *v.* Totten, 13 Ark. 609. If it be stipulated that one partner shall make up and state the joint accounts, and he do so in the absence of his copartner, *ex parte*, it is the duty of the latter to look into them within a reasonable time, and to point out the errors, if any exist; or he will be considered as having acquiesced in the correctness of the accounts as stated on the books of the firm. In stating the accounts of partners, as between themselves, the entries on the partnership books, to which both parties have had access at the time when those entries were made, or immediately afterwards, are to be taken, *primâ facie*, as correct; subject, however, to the right of either party to show a mistake or error in the charge or credit. Heartt *v.* Corning, 3 Paige, 566, 572. And see Lynch *v.* Bitting, 6 Jones Eq. 238. *Post*, Ch. xvi.

(*e*) By articles of partnership, it was agreed that just and true accounts should be made out half-yearly, and signed by the partners; and that such accounts should not afterwards be called in question, except for errors discovered in the

method of closing the accounts and dividing the property at dissolution. These provisions, however, will be considered when we speak of the dissolution of a partnership.

§ 168. **Provisions for giving Care and Skill and Time.** — The general law of partnership requires of each partner, as we have already seen, due devotion of his time and care to the concerns of the firm, and entire absence from all business on his own account which can interfere with this duty to the firm. (*f*) Sometimes the articles of partnership contain provisions on this point; (*g*) and they may have the effect of enlarging the power of a partner to engage in other and independent employments. For if they provide that no partner shall engage in this or that business, specifying them particularly, the maxim, that the expression of one thing excludes what is not expressed, might leave each partner at liberty to engage in other branches of business not enumerated. (*h*) But this would not be pressed too

lifetime of all the partners. The accounts were made out by one of the partners; and, after the death of two of the other partners, it was discovered that the accounts were fraudulent. It was held, by Sir Lancelot Shadwell, Vice-Chancellor, that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. Oldaker *v.* Lavender, 6 Sim. 239. See North British Bank *v.* Collins, 28 Eng. L. & Eq. 7.

(*f*) American Bank-Note Co. *v.* Edson, 56 Barb. 84. Where there are no covenants, a man may engage in as many partnerships as he pleases, provided he does not violate the principle stated in the text. Caldwell *v.* Lieber, 7 Paige, 483, 494, per Willard, V. C. If justice require it, one partner will be enjoined from engaging in any business prejudicial to the firm, whether there be a covenant against it or not. Marshall *v.* Johnson, 33 Ga. 500. The right of a partner who withdraws from the firm to engage in the same business which the remaining partners are prosecuting, or in any rival or hostile business, will be considered when we come to treat of the consequences of dissolution, and therein of retiring partners. [And see *post*, § 181, *note*.]

(*g*) "In partnership engagements, a covenant, that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged, is not only permitted, but is the constant course." Morris *v.* Colman, 18 Ves. 438; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 706. And, in such case, if one of the partners violate this covenant, the rest may join in suing him for the breach; he being in that respect several from them all, and they all joint against him. Thimblethorp *v.* Hardesty, 7 Mod. 116; Eccleston *v.* Clipsham, 1 Saund. 153; Spencer *v.* Durant, Comb. 115; Saunders *v.* Johnson, Skin. 401.

(*h*) In Glassington *v.* Thwaites, 1 Sim. & S. 132, Sir John Leach said: "If some of the proprietors of a morning paper are also the proprietors of an evening paper, they may have a stronger interest to promote the success of the evening paper than of the morning paper, and a strong temptation to use the information obtained at the expense of the morning paper for the benefit of the evening paper. This temptation forms a powerful objection in all cases to the partner in the concern of one newspaper being permitted to be a partner in the concern of any other newspaper. But it is an objection founded on the principle of policy and discretion, against which parties may protect themselves by their contracts; and, accordingly, it is a common covenant, in such partnership articles, that no partner shall be the proprietor of any

far. No such maxim or principle would countervail the general principle requiring good faith and mutual co-operation between the partners. And, therefore, it would not permit a partner to injure his firm, for his own benefit, by allowing any mere implication to give him power to do so. (*i*) But, on the other hand, any agreement respecting the business would be extended by construction far enough to give to partners the protection it was intended to afford. (*j*) It seems, however, that an agreement not to engage in the same business, on the partner's own account, does not prevent him from canvassing for future business when he shall be by himself. (*k*) But if a partner, under such agreement, violate it by engaging in independent business, equity may require of him to admit his partners as partners also in that business. (*l*) If, however, a partner under such agreement, with the consent of his partners, enters into or forms a new copartnership for the same business, this will not make the partners of the new firm copartners in the old firm. (*m*)

§ 169. **Provisions for a Dissolution.** — Equity has in general full power to decree dissolution, and to remove a copartner for sufficient reasons; but, if this subject enters into the articles, all provisions respecting it — as to the cause, the time, the manner, and consequences — will be respected, so far as they do not conflict with justice; and an equitable construction will be given to any language on the subject. (*n*) [1] Thus, if insolvency be

other newspaper. In the present case, there is actually a covenant that the proprietors will not be concerned in any other morning paper, which, by implication, affords the conclusion that it was the intention of the parties that they might engage in the concern of any evening paper." See also Caldwell *v.* Lieber, 7 Paige, 483, 496.

(*i*) This is well illustrated by the case from which we have just quoted. Glassington *v.* Thwaites, 1 Sim. & S. 124.

(*j*) Where two entered into partnership for eleven years, in the trade of brewers, and agreed that, "if during the term either should desire to quit the said art or mystery, he should give six months' notice of his intention, at the end of which the other party should be at liberty to continue the trade on his own account," it was held, that the party giving notice could not carry on the trade elsewhere on his own account; but that he must either continue the partnership, or give up such trade altogether. Cooper *v.* Watlington, 2 Chitty, 451, 3 Doug. 413.

(*k*) Coates *v.* Coates, 6 Madd. 287.

(*l*) Somerville *v.* Mackay, 16 Ves. 382. See Caldwell *v.* Lieber, 7 Paige, 482; Moritz *v.* Peebles, 4 E. D. Smith, 135.

(*m*) Bosanquet *v.* Wray, 6 Taunt. 597.

(*n*) The case of Blisset *v.* Daniel, 11

[1] A partner may institute proceedings to enforce a provision for dissolution in the articles. Meredith *v.* Ewing, 85 Ind. 410. Where the articles provided for termination of the partnership by written notice, given by one partner, to take effect in sixty days, and one partner paid to the other a bonus for admission into the partnership, the other had a right immediately to terminate the partnership by notice, without cause. Swift *v.* Ward, 80 Ia. 700, 45 N. W. 1044.

named as a cause for which a partner may be removed, this will be held to mean any actual inability to pay one's debts, through

Hare, 493, exemplifies the view in which courts of equity regard clauses of expulsion in deeds of copartnership, and the manner in which such provisions are construed, and their operation controlled, so as to prevent their working injustice or oppression. The firm of John Freeman & Copper Company had carried on a very large business for more than a century, when, in 1844, the then partners, including the plaintiff, Blisset, and six other persons, executed new articles, though in the form which had always been used by the ancient firm. By these articles the firm was to continue fourteen years from the 30th June, 1843. The joint effects were estimated at 72,000*l.*, the whole capital being put at 112,500*l.*, divided into twenty-five shares of 4,500*l.* each. It was provided · "that it shall be lawful for the holders of two-thirds or more of the shares for the time being, from time to time to expel any partner, by giving to or leaving for him, at his then or last place of abode in England or Wales, a notice in writing, under their hands, of such expulsion; which, in that event, shall operate from and at the time of the giving or leaving such notice." Notice of the dissolution of the firm as to the expelled partner, drawn in a prescribed manner, and signed by the remaining partners, was to be published in certain papers.

Under these articles the joint business was harmoniously conducted for some years. Finally, at a meeting of the then partners, on the 26th August, 1850, the plaintiff had a dispute with Vaughan, one of the defendants, and the manager of the joint business. On the 29th August, at their usual meeting, all the partners signed the balance-sheet of the 30th June then last. On the evening of that day, however, the plaintiff received a notice that he was expelled from the firm, drawn according to the terms of the partnership deed; and the prescribed notice of dissolution was, as far as practicable, published in the specified papers. The plaintiff, however, refused to sign the notice of dissolution. It farther appeared that none of the partners, except Vaughan, desired their connection with the plaintiff to cease, and that they had been induced to sign the notices of expulsion and dissolution by the suggestions and arguments of Vaughan, and his threats to leave the management of the business if they did not.

Upon these facts the Vice-Chancellor (Sir W. P. Wood) said that, among other questions, this arose, viz.: Whether the power of expulsion, in the articles of partnership, could be exercised, without any cause assigned, by partners holding two-thirds of the occupied shares, by their signing a note in the form prescribed by the articles, without any previous meeting in committee with each other. And it was held, that no previous meeting of the partners was necessary, and that no cause for giving the notice of expulsion was necessary to be assigned or established.

The court then considered the question, whether, assuming this power of expulsion to exist, it had been so exercised that the court would give effect to it, and declare that the plaintiff had ceased to be a partner. The Vice-Chancellor said that all the partnership stipulations must rest upon a basis of good faith; that the principles of good faith, as applied to partnership, had settled that a partnership cannot be dissolved by any partner for his own benefit; that, therefore, the literal construction of the present articles could not, in all cases, be enforced; that the power of expulsion, given by the articles in the present suit, to two-thirds of the partners, was never created with the view that it might be exercised by them for their own private benefit; that it was inserted in the deed to be used, not for the benefit of the two-thirds exercising the power, but on behalf of the whole partnership. Applying these principles to the case at bar, his Honor held, that, considering the concealment from the plaintiff of any intention on the part of the partners to act on the clause of expulsion until after he had signed the annual balance-sheet, and in view of the fact that Vaughan had procured the concurrence of the other partners to the expulsion, for his own ben-

inadequacy of means, and not be limited to a formal insolvency under the statute. (*o*) In general, however, it would be held, that a partner should not be liable to removal for the first steps towards, or imperfect doing of, an act which it is agreed shall give the right of removal, but only for its completion. (*p*)

§ 170. **Provisions for Arbitration.** — Not unfrequently, articles of partnership contain a clause, that all disputes between the partners, or all questions arising at dissolution, or certain other questions, shall be submitted to arbitration. (*q*) But the same rule will doubtless be applied to this provision in the articles as to a similar one in policies of insurance, or indeed any other instrument. Upon this subject, the law was settled, somewhat suddenly, but decidedly, in England, both by statute (*r*) and by adjudication, (*s*) and for reasons which may operate upon the

efit, and by the use of threats, and by the undue exercise, in other ways, of his influence upon the minds of his copartners, there being no proof of any misconduct on the part of the plaintiff, the power of expulsion given by the articles had not, in the present instance, been exercised *bona fide*.

See, also, as an interesting case of the expulsion of a partner, under provisions in the articles of copartnership, Patterson *v.* Silliman, 28 Pa. 304.

(*o*) Parker *v.* Gossage, 2 C., M. & R. 617; Biddlecombe *v.* Bond, 4 A. & E. 332.

(*p*) By articles of copartnership, it was provided, that it should be lawful for the partners to dissolve the partnership as to any partner who should make any mortgage, pledge, sale, assignment, or other disposition of his share of the partnership stock and effects, or who should become bankrupt or insolvent, or should permit any part of the partnership property to be taken in execution for his separate debt. It was held, that a partner was not debarred, by the said articles, from giving a warrant of attorney, and that it was only in case it produced a certain effect, that his copartners were empowered to determine the partnership. Mills *v.* Osborne, 7 Sim. 37.

(*q*) Where one partner gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person, as he might see fit," it was held, that this gave the son power to submit the account to arbitration. Henley *v.* Soper, 8 B. & C. 16. Such an agreement to refer will be strictly confined to the special matters of reference. De Pusey *v.* Du Pont, 1 Del. Ch. 82.

(*r*) By section 11th of the Common-Law Procedure Act, 1854 (17 & 18 Vict. ch. 125), if the parties to an instrument, in writing, have agreed to refer to arbitration any existing or future differences between them, a court or judge may, at discretion, upon application of the defendants or any of them, stay proceedings in an action commenced by any of the parties, against any or all the rest, in respect of the matters so agreed to be referred, if there is no sufficient reason why such matters should not be referred according to the agreement. See Russell *v.* Pellegrini, 6 E. & B. 1020; Wallis *v.* Hirsch, 1 C. B. N. S. 416. It is to be observed, that this statute does not have the effect of making a covenant to refer a good plea in bar in an action at law upon the subject-matter agreed to be referred. See Livingston *v.* Ralli, 5 E. & B. 132.

(*s*) The general principle, applicable to provisions of this character, has certainly been, until quite recently, that no mere agreement to refer a controversy to arbitration will be allowed to oust the proper courts of their jurisdiction. Thompson *v.* Charnock, 8 T. R. 139; Contee *v.* Dawson, 2 Bland, 264; Hill *v.* Hollister, 1 Wilson, 129. See Allegre *v.* Insurance Company, 6 H. & J. 413; Randel *v.* Chesapeake, &c.

courts of this country when the question shall come before them hereafter. If the parties choose to agree to an arbitration, then questions may arise as to the effect of an award; and these will be considered in a subsequent chapter.

§ 171. **Provisions for power of Majority.** — The general powers

Canal Co., 1 Harr. (Del.) 233, 275; Gray *v.* Wilson, 4 Watts, 39; Stone *v.* Dennis, 3 Port. 231; Thomas *v.* Fredericks, 10 Q. B. 775; Haggart *v.* Morgan, 4 Sandf. 198; Frink *v.* Ryan, 4 Ill. 324. Hence, it has been considered very doubtful whether an action would lie between partners for the breach of a covenant to refer partnership disputes to arbitration. Tattersall *v.* Groote, 2 B. & P. 131; Gray *v.* Wilson, 4 Watts, 41.

But this doubt may be considered as to a great extent removed (at least as far as the English courts are concerned) by a decision in the Court of Queen's Bench. Livingston *v.* Ralli, 5 E. & B. 132. Lord Campbell, C. J., there said: "It is clear, on principle, that an action will lie for the breach of an agreement to refer. There is an express promise, and abundant consideration for the promise. Such an action is not contrary to any principle of law or to public policy; it is most reasonable and just that parties should be at liberty to introduce into their contract a stipulation that, if any difference arises, it should be referred to arbitration. It would be a great infringement on the liberty of the subject if he were not to be permitted to refer a question to a domestic tribunal. Then, what authority is there to the contrary? Lord Eldon, one of the greatest of judges, seems to have entertained a doubt, though I do not find any decision by him upon the point. But since I have known Westminster Hall, the opinion has been that such an action is maintainable." The distinction is between bringing an action upon the agreement to refer, and pleading that agreement in bar to an action upon the subject agreed to be referred. In this latter case (though not in the former), the doctrine applies, that the courts of law cannot be divested of their jurisdiction by an agreement to refer; and hence such a plea is not a good plea in bar to the action. Wood *v.* The Copper Miners' Co., 17 C. B. 561, per Williams, J.; Scott *v.* Avery, 5 H. L. Cas. 811, per Lord Chancellor Cranworth; Thompson *v.* Charnock, 8 T. R. 139. In Livingston *v.* Ralli, *supra*, Coleridge, J., said: "We should be ousting the court of its jurisdiction if, where a party complains that an agreement is broken, the defendant was allowed to answer: 'You cannot go to the court, because it is an agreement to refer, and the court will not enforce such an agreement.' The fallacy seems to be in confounding the distinction between an action for refusing to concur in referring a difference, and an action upon the subject agreed to be referred. Setting up an agreement to refer, as a defence, is very different in effect from bringing an action upon the subject itself."

Another reason generally given why, for breach of covenant to refer, no action can be maintained, is the difficulty of directing a jury how to assess the damages; which in most instances, at least, would necessarily be merely nominal. Tattersall *v.* Groote, 2 B. & P. 131; Street *v.* Rigby, 6 Ves. 818; Mitchell *v.* Harris, 2 Ves. Jun. 134. "But that is not a reason why the action should not be maintained; because, though the damages may not be substantial, the matter in question may be very important." Coleridge, J., in Livingston *v.* Ralli, *supra*. It seems, moreover, that this objection as to the difficulty of calculating the damages would be of no force where the covenant to refer contained a clause fixing upon a certain sum, by way of liquidated damages for the breach, as was the usual course adopted in references to arbitration under the civil law. 2 Story Eq. § 1461. Thus, in Street *v.* Rigby, 6 Ves. 818, Lord Eldon said: "There are prudential ways of drawing these articles. There might have been an agreement for liquidated damages to enforce a specific performance, if an action could not produce sufficient damages, or equity would not entertain a bill for a specific performance." Stone *v.* Dennis, 3 Port. 239. See *infra*, § 174, respecting provisions for damages in partnership articles.

of a majority of the partners we have already considered. If the articles give to a majority a power to bind the rest, this power may be protected so far as it is expressed, but will not be extended by implication or construction. It is necessarily confined to matters which occur in the conduct of the partnership business or interests. (*t*) A majority acting under such articles may have no power, in case of difficulties, to sell out the whole concern, against the will of the minority. (*u*) But, in accordance with principles which we have already considered, the parties may, by long-continued acquiescence and recognition, justify a court of equity in sustaining a course of conduct on the part of the majority not authorized by the articles, and even perhaps prohibited by them. (*v*)

§ 172. **Provisions for Division of Profits.**— Very frequently the articles provide for the division of profits, and determine the proportion in which each partner takes his share. There is nothing to prevent their making any bargain on this subject that they see fit to make. Where they make none, it is certainly the general rule, both in law and equity, that the profits shall be shared equally among the partners. (*w*) But where, from inequality of shares in the concern, or of contribution to it, coupled with other circumstances of a similar indication, it must be obvious that a different distribution was expected and intended, a court of equity might be expected so to order. (*x*) [1]

(*t*) Glassington *v.* Thwaites, 1 Sim. & S. 131.

(*u*) Hence, where a partnership existed among a large number of persons in certain newspapers, under an agreement that it should be managed by a committee of five, and by general meetings, at which the vote of the majority was to be binding, with a provision that any one wishing to retire should first offer his share to the committee at a certain price, and, if they declined to buy, might sell it to any other person, — it was held, that the majority were not able to sell the whole concern without the consent of all; but that, where all but two were desirous of retiring, they might sell their own shares, without making an offer of them to the committee. Chapple *v.* Cadell, Jac. 537.

(*v*) Glassington *v.* Thwaites, 1 Sim. & S. 124, 131.

(*w*) Robinson *v.* Anderson, 20 Beav. 98, 7 De G. M. & G. 239; Webster *v.* Bray, 7 Hare, 159. See Gill *v.* Geyer, 15 Ohio, 399.

(*x*) "Whenever a partnership adopts a project, within the principles of their agreement, for the purpose of profit, it must be for the benefit of all the partners, in proportion to their respective interests in the concern." Per Sedgwick, J., in Gray *v.* Portland Bank, 3 Mass. 364. There a banking company had been incorporated with the privilege of creating a stock not less than one sum, nor greater than another. The company commenced business with the smaller capital, but afterwards voted to increase it to the largest. It was held, that those who held the stock in the capital first raised had a right to subscribe for and hold the new stock in proportion to their respective shares in the

[1] *Provision relating to division of profits.* — Profits of a business consist of the excess of income over ordinary expenditure. An investment for the permanent improvement

§ 173. **Sharing of Loss.** — Thus, if it was provided that one should find all the money, and the other do all the work, and that the profits should be divided, and the transaction resulted in no profit whatever, but in a considerable loss, — it seems formerly to have been held that the party supplying funds would be obliged to sustain the whole of this loss: he could not call on the other party to contribute to him any portion of it; for, as *between themselves*, they were partners only as to profits, although the person buying and selling might have been liable *in solido*, as a partner, for the debts incurred by the purchase, or for the transport or sale of the merchandise. (*m*)

[The better view, however, is that although all or a large part of the capital is furnished by one partner, the entire loss is to be borne by all. Hence after payment of the debts, the contributions of partners to capital are all to be repaid before there can be any division of profits.[1] And if the assets are not sufficient,

old. See Raymond *v.* Putnam, 44 N. H. 160.

(*m*) Heran *v.* Hall, 1 B. Mon. 159. See Irving *v.* Excelsior Fire Ins. Co., 1 Bosw. 507; Newbrau *v.* Snider, 1 W. Va. 153; Lamb *v.* Grover, 47 Barb. 317; Miller . Price, 20 Wis. 117.

of the firm property is not ordinary expenditure, and is not to be subtracted from income in order to arrive at profit. It was so held, where one was to be paid by a proportion of the profits. Braun's Appeal, 105 Pa. 414. See Succession of Harris, 39 La. Ann. 443, 2 So. 39.

In the absence of any provision in the articles or other agreement, the partners will be presumed to share the profits and losses equally. Paul *v.* Cullum, 132 U. S. 539; Brewer *v.* Browne, 68 Ala. 210; Ligare *v.* Peacock, 109 Ill. 94; Fleischmann *v.* Gottschalk, 70 Md. 523, 17 Atl. 384; Ratzer *v.* Ratzer, 28 N. J. Eq. 136. And if there is no stipulation as to losses, it is presumed that they will be divided. Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850. But there is nothing to prevent the parties from making such arrangements as they please with regard to sharing profit and loss. Paul *v.* Cullum, 132 U. S. 539; Welsh *v.* Canfield, 60 Md. 460; Fleischmann *v.* Gottschalk, 70 Md. 523, 17 Atl. 384.

Where the articles provided that "in the event of the net profits of the business in any one year being so small that the portion of said T. W. & J. A. should not amount to $2500 exclusive of the interest on their unpaid capital, that then it is agreed that their accounts shall each be credited a sum sufficient to make that amount, unless such deficit should occur from losses sustained by fire, robbery, or other causes outside of the regular, ordinary business of the copartnership," it was held that the share of T. W. was to made up to be $2500 profit every year by making the necessary credits on the books of the firm, even if there was an actual loss. Welsh *v.* Canfield, 60 Md. 469.

In Fulmer's Appeal, 90 Pa. 143, it appeared that profits were to be divided according to the capital actually paid in. Capital was to be equal and to be paid in as needed. The managing partner refused to let the other partner see the books, or to inform him how their capital accounts stood. The other demanded to know, in order to equalize payments. It was held that since there was no wilful default in the latter, he could have an equal division of the profits.

[1] Nowell *v.* Nowell, L. R. 7 Eq. 538; Binney *v.* Mutrie, 12 App. Cas. 160; Sangston *v.* Hack, 52 Md. 173; Whitcomb *v.* Converse, 119 Mass. 38; Living-

after paying the debts, to repay the capital, the deficit must be shared by all the partners; and the partner who has contributed more than his share of capital is therefore entitled to contribution from the rest.[1]]

§ 174. **Liquidate Damages for Misconduct of Partner.** — Sometimes the articles provide that for some specified misconduct, or breach of agreement, the offending partner shall pay a certain defined sum, by way of liquidated damages. And this may bring up questions which belong not so much to the law of partnership as to the law of contracts. Whatsoever is, in fact, a penalty for wrong-doing, or default of any kind, whether it be called penalty or anything else, is, both in law and in equity, cut down to an adequacy with the wrong done, so that it shall afford full compensation, and nothing more. At the same time, there may be wrongs anticipated, or at least provided for, of which it is difficult or impossible to determine, even when they occur, with any exactness, the amount of damage they cause. In such a case, parties may agree beforehand as to what shall be taken for the amount of damages, if that thing happens. This is to agree upon liquidated damages; and in such a case courts will support the agreement, provided it is made in good faith, is reasonable and not oppressive in its nature, and the damages are not, in point of fact, excessive, or out of all due proportion to the damage actually sustained. (*y*) If, however, liquidated damages are agreed on even under that name, and the default to which they apply causes damages of an exact amount, or of an amount which can be exactly ascertained, the courts will often disregard the agreement, and, in some form, give only adequate compensation. (*z*)

(*y*) See the principles upon this subject stated, and the cases collected, in 3 Pars. on Cont. 156-163, 5th ed. [See 1 Sedg. Dam. (8th ed.) § 389 *et seq.*]

(*z*) Orr *v.* Churchill, 1 H. Bl. 227, 232; Kemble *v.* Farren, 6 Bing. 141; Boys *v.* Ancell, 7 Scott, 364; Heard *v.* Bowers, 23 Pick. 455, 462; Gray *v.* Crosby, 18 Johns. 219, 226; Hoag *v.* McGinnis, 22 Wend. 163, Bagley *v.* Peddie, 5 Sandf. 192; Sesston *v.* Blanchard, 130 Mass. 341; Hayes *v.* Hayes, (N. H.) 19 Atl. 571; Leserman *v* Bernheimer, 113 N. Y. 39, 20 N. E. 869; Shea *v.* Donahue, 15 Lea, 160. So where land was bought with A.'s money and sold by B.'s skill, the profits to be divided, it was held that there were no profits to divide until enough land had been sold to repay A.'s contribution and all expenses. Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

[1] Hellebush *v.* Coughlin, 37 F. R. 294; Turner *v.* Turner, (Ky.) 5 S. W. 457; Jones *v.* Butler, 87 N. Y. 613; Emerick *v.* Moir, 124 Pa. 498, 17 Atl. 1; Wipperman *v.* Stacy, 80 Wis. 345, 50 N. W. 336. But where the advances of a partner were to be repaid by a greater share of the profits, which were to be equally shared after the advances had been repaid, it was held, upon dissolution before entire repayment of the advances, that the copartner was not bound to share the loss. McCormick *v.* Stofer, (Ky.) 12 S. W. 151.

If the agreement be one which, in fact and substance, determines beforehand damages for a default, of that kind that these damages ought to be so liquidated; and if, on the other hand, the sum is a reasonable one, — the court will sustain it as liquidated damages, even though these damages are called a penalty, or by no name whatever. (*a*) So, at least, a court of equity would decide. (*b*) And if courts of law were constrained to treat as a penalty what the parties so called, the effect would be the same; because this penalty would need no cutting down to make it adequate.

There is one rule on the subject of liquidated damages applicable to articles of partnership, and to all other contracts. No one bargain for liquidated damages is enforced by the courts, unless the damages agreed upon are for one distinct breach only; or, if for many, are payable only when all these breaches are committed, and they are such that the actual amount of damages thence resulting cannot be ascertained. If, for example, the articles enumerate many duties and many agreements, and it is agreed that, for any breach thereof, the offending party shall pay a certain sum of money, such a bargain would seldom or never be enforced. It puts all the breaches on the same footing; it puts a breach of all on the same footing as a breach of any one; and it brings together breaches of which some may cause damages as ascertainable as the withholding a certain debt, while some are as incapable of exact estimate as the violation of a general promise of good conduct. (*c*)

sions *v.* Richmond, 1 R. I. 298, 303; Jordan *v.* Lewis, 2 Stew. 426; Mead *v.* Wheeler, 13 N. H. 353.

(*a*) See Lowe *v.* Peers, 4 Burr. 2225; Farrant *v.* Olmius, 3 B. & Ald. 692; Fletcher *v.* Dyche, 2 T. R. 32, 36; Birch *v.* Stephenson, 3 Taunt. 469; Denton *v.* Richmond, 1 Cr. & M. 734; Duckworth *v.* Alison, 1 M. & W. 412; Leighton *v.* Wales, 3 M. & W. 545; Crisdee *v.* Bolton, 3 C. & P. 239; Legge *v.* Harlock, 12 Q. B. 1015; Price *v.* Green, 16 M. & W. 346; Galsworthy *v.* Strutt, 1 Exch. 659; Dakin *v.* Williams, 17 Wend. 447, 22 Wend. 201; Pearson *v.* Williams, 26 Wend. 630; Heard *v.* Bowers, 23 Pick. 455, 463; Mead *v.* Wheeler, 13 N. H. 351. "Whether the sum mentioned in an agreement to be paid for breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument." Per Wilde, C. J., in Sainter *v.* Ferguson, 7 C. B. 727.

(*b*) If liquidated damages are legally due, equity will not relieve against them. East India Co. *v.* Blake, Finch, 117; Small *v.* Fitzwilliams, Prec. Ch. 102; Rolfe *v.* Peterson, 2 Bro. P. C. 436 (Dublin ed.); 6 Bro. P. C. 470. And if a lessee of land covenant that he will not plough a certain part of it, and that, if he do so, he will pay a certain sum per acre, equity will neither enjoin the covenantor from violating his covenant, nor relieve him from the agreed penalty, if he do violate it. Woodward *v.* Gyles, 2 Vern. 119.

(*c*) Astley *v.* Weldon, 2 B. & P. 346; Kemble *v.* Farren, 6 Bing. 141; Charrington *v.* Laing, 6 Bing. 242; Boys *v.*

§ 175. **Provisions for Appropriations of Property to a Partner.** — If the partners choose to agree that certain items of property used by the firm, as the house or store occupied by them, or the fixtures, or implements, or other chattels which are not for sale or use, or even certain specified parts or portions of the goods or merchandise bought and sold, shall not belong to the common stock, but be owned by one or more of the partners, or by the whole of them, in severalty, — there is nothing to prevent such a bargain, and nothing to interfere with its force or operation among the partners themselves. (*d*) [1] The agreement might give rise to conflicting rights, and to difficult questions of fact; but there is no rule which prevents their making it. When, however, such a bargain is considered with reference to the creditors of the firm, a different state of things arises. In case of the insolvency of such a firm, or of any firm, there are usually two classes of creditors; those to whom the copartnership, as such, is indebted; and those to whom the several partners, or some of them, are indebted. We shall presently see that, by an universal rule, founded on obvious justice, the creditors of the firm are exclusively entitled to all the assets of the firm, until their debts are paid, and that the law is tending to give the creditors of the separate partners an equally exclusive right to the separate or private property of the indebted partner. Now, can the respective rights of these classes of creditors be made dependent upon the pleasure or the bargains of the partnership? To a certain extent, this may be so; but it is not easy to draw the line exactly, and say where the power of the partners, in this respect, terminates. If by the original articles, or by any sub-

Ancell, 7 Scott, 364; Davies *v.* Penton, 6 B. & C. 216; Galsworthy *v.* Strutt, 1 Exch. 659; Atkyns *v.* Kinnier, 4 Exch. 776; Shute *v.* Taylor, 5 Met. 67; Bagley *v.* Peddie, 5 Sandf. 192; Beale *v.* Hayes, 5 Sandf. 640; Gower *v.* Saltmarsh, 11 Mo. 271; Carpenter *v.* Lockhart, 1 Ind. 434; Bright *v.* Rowland, 3 How. (Miss.) 398; Cheddick *v.* Marsh, 1 N. J. 463; Curry *v.* Larer, 7 Barr, 470. See particularly Galsworthy *v.* Strutt, Atkyns *v.* Kinnier, and Bagley *v.* Peddie, *supra*, as cases well exhibiting the modern English and American doctrines on this subject; and for the difference, if any, between them, see 3 Pars. on Cont. 157, 159, and notes, 5th ed.

(*d*) We have already seen that the contribution of one partner to the common stock, or even the contributions of all the partners, and thus the entire capital of the partnership, may consist exclusively of the use of property. The questions which arise upon the retirement, bankruptcy, &c., of partners respecting the transmutation or conversion of joint property into separate property, and *vice versâ*, will be considered, hereafter, when we treat of the dissolution of a firm by those means.

[1] Where one partner is to have the exclusive possession of firm property, he may maintain a possessory action against another partner who takes it. Ivey *v.* Hammock, 68 Ga. 428.

sequent agreement, three men who enter into partnership, and transact business as A., B., & Co., contract with each that no part of their merchandise shall be or form a part of the common property of the firm, but that each partner shall own in severalty one-third part of everything bought, and one-third of the proceeds of every thing sold; and if this firm should become insolvent, and the several and private creditors claim all the merchandise of the firm as liable to their processes under this contract, leaving nothing for the creditors of the firm, — no court would ever look with favor on such a claim. This is so obvious, that precisely this arrangement probably never was made, nor will be. But if, on the other hand, the partners agree that the house which one of them owns, and the whole firm use, shall remain the property of that one partner; or if they agree that this piece of property bought and paid for by the firm, and used by them, shall belong to one partner alone, and be charged to him, and that piece of property to another, — such arrangements, made in good faith, and when no insolvency was apprehended, and in themselves reasonable, would be sustained by the courts. But they would hesitate to go farther. It is said by Justice Story, that "In partnership articles it is sometimes agreed that the real estate and fixtures belonging to the firm shall not be treated as partnership property, as between the partners; but that all the partners shall have a several and individual interest therein. In such cases, the interests of the partners will be treated throughout as their several and separate estate; and, of course, in cases of bankruptcy of the partners, it will be distributable to and among their separate creditors respectively, in preference to their joint creditors." (*e*) A similar statement is made by Collyer. (*f*) The authorities cited go no farther than that real property, bought and paid for from the partnership funds, may be appropriated to one partner, and the price charged to him, and that a subsequent insolvency of the firm will not divest his separate title; or that real property, originally owned and held by one partner alone, may be, by agreement, used by the partnership, without becoming partnership property. (*g*) But we apprehend that the practical rule now would be, certainly in England, and probably

(*e*) Story on Part. § 205.

(*f*) Collyer on Part. § 217.

(*g*) Smith *v.* Smith, 5 Ves. 189; *Ex parte* Smith, 3 Madd. 63. We shall have occasion to consider these and other analogous cases at large when we come to treat of the real estate of a firm, and of the rights of joint and separate creditors upon the dissolution of a firm by bankruptcy. (See *post*, ch. 11, and ch. 15, sect. 4.)

in this country, that property, whether real or personal, which was bought by partnership funds, or put by a partner into partnership stock, either formally and technically, or actually and substantially, and in such a way that it is held forth to persons dealing with them as partnership property, could not be divested of this character and made private and several property, merely by an agreement of the partners; at least, not in respect to any parties who are not made acquainted with the agreement before trusting the firm.[1]

§ 176. **Provisions respecting Firm-Name.** — Articles almost always provide what shall be the name of the firm; this name and style may be, as we have seen, whatever the partners wish; (*gg*) and it should always be adhered to. If any partner uses any other name to designate the firm, it is, in fact, a breach of this contract; and, if any injury results from it, he would be responsible to those who suffered, whether they were his copartners or other persons. (*h*) It is, however, not very unusual, in this country, to find the long name of a firm shortened in practice; Christian names are dropped, or other changes introduced, to make the name of the firm easier to write or to speak. Such a change being made so often, so publicly, and by such persons, that the sanction of the firm may be implied, becomes their legal name; and the firm is bound by it, as they are not by any name that is not strictly their own, unless it be so sanctioned. (*i*) If the firm have adopted, as its proper name and style, John Smith & Thomas Brown, neither Smith & Brown, nor John Smith &

(*gg*) Crawford *v.* Collins, 45 Barb. 269.

(*h*) Marshall *v.* Colman, 2 Jac. & W. 268. In this case, Lord Eldon said: "I have no difficulty in saying, that where the members of a partnership contract by covenant that the firm shall be A., B., C., & D., that it is a breach of that covenant for A. to sign those instruments to which the covenant refers in the name of A. & Co.; but it is no less a breach of that covenant for D. to sign his own name, adding 'for self and partners,' because by these words it can no more be known who are his partners than by the word 'Co.'" And the plaintiff's bill complaining that certain of his partners (defendants) had entered into contracts and engagements for the firm by a name shorter than that provided for in the articles, and praying for an injunction to restrain them from so doing, the Lord Chancellor, though he refused the motion, said: "These gentlemen will do well (if they mean to protect themselves from the interference of this court) to use all the names in the concern: they must do that, or the court will be under the necessity of awarding an injunction, or dissolving the partnership." We have already had occasion to consider at large the name which a firm may adopt, and by which one partner may bind it. The right of a surviving partner to use the name of the old firm will be treated of hereafter.

(*i*) See *ante*, § 97.

[1] See *ante*, § 99.

Co., nor John Smith for self and partner, bind the firm, nor create a partnership debt which is to be paid from partnership assets, unless the peculiar circumstances of the case, in some way, make that *another* name of the firm. For a firm may have two names. It is not very uncommon for a partnership to use one name in one place and another name in another; or one name in one branch of business, or one class of transactions, as in buying or selling, or conveying, and another in a different class, as for accepting, signing, or indorsing negotiable paper. (*j*) But it would be a lax and dangerous practice to use two or more ways of naming the firm, indiscriminately, in all business. In New York, the use of fictitious names is prohibited by statute; and the designation "& Company," or "& Co.," must represent an actual partner or partners, other than those whose names are stated. (*k*) [1]

Where the partnership name is not agreed upon in articles, and is written, that which is used in keeping books and accounts, upon bills of parcels, or on negotiable paper, especially if it is generally known, becomes the partnership name. (*l*)

(*j*) Williamson *v.* Johnson, 1 B. & C. 146; *ante*, § 97.

(*k*) 3 Rev. Stat. N. Y. (ed. 1859) 978; Acts of 1833, ch. 281, §§ 1, 2.

(*l*) Le Roy *v.* Johnson, 2 Pet. 176; *ante*, § 97.

[1] Erle, J. has said that the statute seems not to have been a very useful one. Gay *v.* Seibold, 97 N. Y. 472, 476. Since this is the feeling of the court, it is natural that the statute should have been strictly interpreted. Thus it has been said not to invalidate a transaction unless the false name was used in that transaction. Gay *v.* Seibold, 97 N. Y. 472. And it is no defence to a carrier for the loss of property marked with the fictitious firm name. Wood *v.* Erie Ry., 72 N. Y. 196. Where a husband and wife claimed in good faith to be partners, and the "& Co." represented the wife, it was held to be a violation neither of the letter nor of the spirit of the statute. Zimmerman *v.* Erhard, 83 N. Y. 74.

The California code (§ 2468) requires persons doing business under fictitious names to file and publish a certificate showing the names and residences of all members of the firm, and provides that until this is done the partnership shall not maintain any action upon contracts made or transactions had in the partnership name. It has been held that an assignment of such a claim is not void, and the assignee may sue on it though the required certificate has not been filed. Cheney *v.* Newberry, 67 Cal. 126, 7 Pac. 445; Wing Ho *v.* Baldwin, 70 Cal. 194, 11 Pac. 565. Where the firm name shows only the surname of the partners it is not a fictitious name. Pendleton *v.* Cline, 85 Cal. 142, 24 Pac. 659; Carlock *v.* Cagnacci, 88 Cal. 600, 26 Pac. 597.

SECTION VII.

OF THE RIGHTS OF PROPERTY OF THE PARTNERS INTER SE.

§ 177. **What constitutes Partnership Property.** — It may be well to determine, in the first place, what is partnership property. In general, by this phrase is understood whatever belongs to the partnership. This may be real property; but the law of partnership, in respect to real property, is so much affected by the difference, both at common and statute law, between that property and personal property, and the system of rules, springing in part from their conflict and in part from their combination, is so peculiar, that it is thought best to consider the whole subject of the real property of partners in a separate chapter.

The personal property of a partnership consists mainly of the goods and merchandise which it buys and sells, or makes and sells. The question may arise, at what time property becomes partnership property. If it be sold to a partner in the firm, acting for the firm, it is, of course, partnership property as soon as the sale is complete; for by the sale it passes from the seller to the buyer, and there is no other buyer than the firm. But if goods are sold and delivered to one partner, without any knowledge on the part of the seller that he buys for the firm, and without any act of his indicating that he so buys, and the firm becomes insolvent before the goods are actually mingled with the partnership goods, the question may arise, whether the partnership creditors, or the several creditors of that partner, take the goods. This question must be answered by ascertaining from all the circumstances, to whom the sale was actually made; for if the partner bought, in fact, as agent, although his agency was unknown, and even if it were, and continued to be, purposely concealed, this circumstance should not affect the rights of the creditors of either class. (*m*) Nor can any presumption of law that the goods were bought for the firm arise; although if the

(*m*) Saville *v.* Robertson, 4 T. R. 720; Post *v.* Kimberly, 9 Johns. 470; Gouthwaite *v.* Duckworth, 12 East, 421; Everitt *v.* Chapman, 6 Conn. 347. In these cases and other analogous ones, the question when goods purchased by one partner become the property of the partnership, depends, in great measure, upon the answer to the question whether, at the time of their purchase, the partnership was actually in being, and capable of owning property, or whether it was only agreed upon, and dependent for its actual existence upon the happening of some future event.

goods were such as the firm dealt with, and such as that partner bought at other times for the firm, here would be good ground for argument that he so bought these goods. Still, as he might lawfully have bought them for himself, the burden of proof must be upon the creditors — whether of the firm or of a partner — who, in order to obtain the goods for their own benefit, must maintain an affirmative in respect to the title; and this may depend upon the form of the action, and the parties between whom it arises. Such questions are not very unfrequent in practice, but have not often passed into adjudication; the reason being, that they are questions of fact rather than of law.

Not only all the goods and merchandise properly so called, but all chattels bought by the partnership, or otherwise coming to them, as their furniture, books, &c., are partnership property; and so also all bills of exchange and notes, or other evidence of debts, and all debts or accounts or balances, or other claims; and all shares in companies, or scrip, bought with partnership funds, or otherwise assigned to the partnership, and not transferred to the individual partners and charged in their accounts, would be regarded as partnership property.

It may be well to remark, that a gift or devise of property to a part of the partners in a firm, even if it be on account of a loss sustained by the firm, or be otherwise a consequence of the partnership connection, does not make the property given or devised partnership property, or give any right to it or interest in it to the other partners. (*n*) [1]

(*n*) 2 Swanst. 571, 572. And where two American citizens residing at Baltimore, and a French subject residing at St. Domingo, were in partnership and owners of certain ships captured by British cruisers, and the commissioners, appointed under the 7th article of the treaty of commerce of 1794, between Great Britain and America, for awarding compensation to American subjects who had suffered losses by capture for which they could obtain no redress in the ordinary tribunals, awarded, in compensation of the ships of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen as an alien enemy,— it was held that the sums so awarded were not partnership property, and that the creditors of the partnership had no claim on them, as against the separate creditors of the Americans. Campbell *v.* Mullett, 2 Swanst. 551. But it seems that, if in a similar case of the seizure of partnership effects, instead of compensation made to one partner, his proportion of the joint property be restored to him, *in specie*, the goods so restored will be held never to have lost their character of partnership property, and will therefore be divisible among the several partners according to their respective interests. Thompson *v.* Ryan, 2 Swanst. 555. See Rowley *v.* Adams, 8 Jur. 994, 1000; Clarke *v.* Richards, 1 Younge & C. 351, 383. In this last case, it was held,

[1] Where a firm transfers all its assets to a corporation, and each partner receives stock of the corporation in payment, the stock is the individual property of the partners. Singer *v.* Carpenter, 125 Ill 117, 17 N. E. 761.

§ 178. **Title to Partnership Chattels.** — [The personal property belonging to a partnership is not owned by the individual partners, but by the firm. Consequently title may be conveyed to the firm in the firm name, as by a bill of sale or chattel mortgage.[1] Consequently a partner has no interest in any specific property,[2] and if he attempts to transfer his interest in specific property, no such interest passes.[3] A partner has, however, an interest in the firm assets as a whole, which he may sell, mortgage, or pledge,[4] even when the partnership is being wound up, and the assets are in the hands of a receiver.[5]

The interest of a partner which he transfers by such a conveyance is his distributive share of the assets after the partnership accounts are settled and the debts paid.[6] And when the partnership is insolvent the purchaser of a partner's interest gets nothing.[7] If one partner without authority attempts to mortgage or sell the partnership assets, under such circumstances that title does not pass, the whole interest of the partner passes.[8] By agreement between the partners the assets may be divided and become individual property of the partners;[9] but a single partner cannot demand a part of the assets,[10] nor should they be shared, pending a final settlement, till all the accounts are adjusted."[11]]

that where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of the partnership had expired.

[1] Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364. And a partner who has conveyed to the firm ceases to own the property. Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787.

[2] Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; State *v.* Bowden, 18 Fla. 17; Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854. Since taxes are assessed upon the property which belongs to the firms, they are to be paid out of the assets of the firm, not by the partners in proportion to their respective interests, or to their respective balances on the firm books. Meguiar *v.* Helms, (Ky.) 14 S W. 949.

[3] Nichol *v.* Stewart, 36 Ark. 612.

[4] Collins's Appeal, 107 Pa. 590.

[5] Schurtz *v.* Romer, 82 Cal. 474, 23 Pac. 118.

[6] Bank *v.* Carrollton R. R., 11 Wall. 624; Nichol *v.* Stewart, 36 Ark. 612; Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854; Bowman *v.* Spalding, (Ky.) 2 S. W. 911; Sherwood *v.* Creditors, 42 La. Ann. 103, 7 So. 79; Still *v.* Focke, 66 Tex. 715; 2 S. W. 59. See Buck Stove Co. *v.* Johnson, 7 Lea, 282.

[7] Mayer *v.* Garber, 53 Ia. 689, 6 N. W. 63.

[8] Sheehy *v.* Graves, 58 Cal. 449; Carrie *v.* Cloverdale Banking & Commercial Co., 90 Cal. 84, 27 Pac. 58; Burbank *v.* Wiley, 79 N. C. 501.

[9] McKinney *v.* Baker, 9 Ore. 74; Weaver *v.* Ashcroft, 50 Tex. 427. Or the property of one partner. Stanton *v.* Westover, 101 N. Y. 265, 4 N. E. 529; Miller *v.* Estill, 5 Oh. St. 509. See Singer *v.* Carpenter, 125 Ill. 117, 17 N. E. 761; *post*, § 252.

[10] See Kuhn *v.* Newman, 49 Ia. 424.

[11] Hall *v.* Clagett, 48 Md. 223.

§ 179. **Proportional Interests of Partners.** — Partners may agree to own the stock, as they may to share the profits, in any proportions that they please. And, if they make no agreement, there is a presumption of law in favor of an equality of interest in the case of the property, as there is of the profits. The authorities cited in the note will show that this presumption, though very general, is not quite universal; (*o*) and it may be rebutted, both in relation

(*o*) Farr *v.* Johnson, 25 Ill. 522. The existence of this presumption has not, however, been uniformly admitted in the English law. See Peacock *v.* Peacock, 2 Camp. 45, and the opinion of Lords Brougham and Wynford, in Thompson *v.* Williamson, 7 Bligh, N. S. 432, 5 Wils. & Sh. 16. This case was heard on appeal to the House of Lords from the Scottish Court of Session, and was decided mainly with reference to the law of Scotland. But the Lords, whose opinions are reported, took occasion to examine the law of England on the point, and, mainly upon the authority of Peacock *v.* Peacock, came to the conclusion that it was not at variance with what they adjudged to be the law of Scotland. Their opinion was, that where parties are in partnership without agreement, it is not a necessary presumption of law that the profits are to be divided in equal shares. Lord Wynford said: "If I was to direct a jury, or was sitting in a situation to exercise an opinion both upon the law and the fact, I should say, if there be no evidence to guide my judgment, I will divide it equally; but I will not be content with merely written evidence, I will look at the circumstances, and I will infer as strongly from the circumstances the intentions of the parties as from the written evidence." And Lord Brougham: "If I was trying at *nisi prius* the question what proportion the partners in a concern were severally entitled to, I should be disposed to advise the jury, leaving the matter to them, that an equal division would be a convenient doctrine of fact, and form the ground for a convenient inference to be drawn, in the absence of other evidence: but that would only be supposing that there was no other evidence in the cause; if there was any other evidence that could be found to alter the proportions, that evidence must furnish the rule, and that would be an additional ground for saying, that it must be a presumption of fact and not of law." And even where there was no evidence, Lord Brougham stated, as the opinion of Lord Wynford, of one of the Chief Justices, and of himself, that a jury should in all cases be directed to take into consideration "the fairness of an equal division; but not discountenancing evidence, rather courting evidence, rather regretting that there was no evidence, and only having recourse to that presumption in the last resort, for want of evidence." See also the opinion of the Master of the Rolls, in Lake *v.* Gibson, 1 Eq. Cas. Abr. 291; Sharpe *v.* Cummins, 2 Dow. & L. 504. These are the principal, if not the only, common-law authorities, which are clearly at variance with the doctrine of the text: Mr. Justice Story, indeed, says (Story on Part. § 24 n. (3)): "It is true, that, in the case of Thompson *v.* Williamson, a doubt was thrown upon this doctrine (the presumed equality of the shares of partners), as a doctrine of the common law, by Lord Wynford and Lord Brougham; but I cannot think that it is successfully maintained by the reasoning contained in their opinions. Each of these learned judges admitted on that occasion, that, if there is nothing to guide the judgment of the court to give unequal shares, there is no rule for them to go by, but to give in equal shares. What is this but affirming, that, in the absence of all controlling circumstances leading to a different conclusion, the presumption of law is, that the partners are to take in equal shares?" We conceive, however, that a consideration of the entire opinions of the two Lords in that case shows that, in their view, the question what proportions the partners in a concern are severally entitled to, is never, in the absence of special agreement, any thing

to the property and to the profits; and, as we should say, more easily in respect to the property than as to the profits. (*p*) For if A., B., & C. combine their property in very different proportions, it is still very possible, and indeed very frequent, in fact, that he who brings less capital brings more skill or more labor, and that the profits are therefore equalized. But while the profits resulting from this mingling of money and labor and skill are equal, so far as refers to the stock alone, we should say that the law would listen favorably to all evidence and all circumstances which tended to preserve the same proportions of interest in the

but a question of fact to be passed upon by the jury. They both admit that there may be instances in which the inference may be made that the partners in a concern have equal shares. But, if we understand their views, this inference is not to be made by the court, but can only be drawn by the jury. That is, the presumption of equality of shares among partners is not a presumption of law, but a presumption of fact. And the question must always be submitted to the jury. And it is obvious, from the whole tendency and scope of the opinions of the two Lords, that unless the question of the distribution of interest were presented in this simple form, "Given that A. & B. are partners; what are their shares?" they did not contemplate that the presumption of equal shares among partners, which they allowed to exist, could have any operation. "It is scarcely possible," says Lord Wynford, "for a case to occur in which there will not be circumstances which it is fit to submit to the consideration of a jury, and which would induce a jury to give in unequal shares."

(*p*) The presumption of equality of interest may be rebutted, not only by proof of an express agreement between the parties to share unequally, but by evidence of any modes of dealing, or of any transactions, from which such a contract can be implied. In Stewart *v.* Forbes, 1 McN. & G. 137, 146; the Lord Chancellor said: "The plaintiff's bill rests upon the supposition that, from 1830 to 1840, Sir Charles Forbes and the plaintiff were equal partners; and Peacock *v.* Peacock, 2 Camp. 45, 16 Ves. 55, 56, was relied on as a foundation for that assumption. In that case, it was properly held, that, in the absence of any contract between the parties, or any dealing from which a contract might be inferred, it would be assumed that the parties had carried on their business on terms of an equal partnership. That case has no application to the present, because there is, in this case, conclusive evidence, not from any form of contract, but from the books of the business and the dealings between the parties, that such were not the terms on which the parties carried on their business. An equal partnership implies not only an equal participation *de facto* in profits and loss, but a right in each partner to claim and insist on such participation. This is what the law has implied in the absence of all evidence of a contrary intention of the parties. But what would have been the decision in Peacock *v.* Peacock, if the books and accounts, instead of absolute silence as to the shares of the partners in each year, had described the shares to which the partners were entitled in the business, and had attributed to the plaintiff four-sixteenths only of the shares of the business? These entries are as conclusive of the rights of the parties as if they had been found prescribed in a regular contract." See Webster *v.* Bray, 7 Hare, 159. It is not to be assumed, however, that the annual stock taken by a partnership necessarily represents the interests of the several partners in the firm; but it may or may not do so, according to the purpose for which, and the mode in which, it is made up. Travis *v.* Milne, 9 Hare, 153.

capital stock which originally existed. Practically, this question cannot often arise. If the firm be insolvent, its stock is all gone, and all questions of ownership disappear when there is nothing to own. Such questions, in practice, come only at dissolution, by death or otherwise; or when some withdrawal or diminution of stock is proposed. Then they will generally be determined by the articles; for they are seldom omitted when there is great inequality in the contributions to be made by the different partners. If not so determined, it might be that law or equity would presume that the same proportions of ownership and interest continue which originally existed; and, certainly, comparatively slight evidence would suffice to establish this. Whether, in the absence of special agreement upon the point, any presumption exists, and what it is, and whether of law or of fact, and what are its grounds, and what its strength, must depend, not on the law of partnership alone, but on that law in connection with the principles of evidence. But notwithstanding some conflict, as indicated in the cases cited in the previous note, we are of opinion that the prevailing rule of law that partners are interested in stock and profits in equal proportions, in the absence of any evidence to the contrary, may be considered as pretty well settled both in England and this country. (*q*)

(*q*) Thompson *v.* Williamson, cited in preceding note, although the *dicta* respecting the English law, which it contains, are entitled to great respect, as the opinions of eminent judges, is yet expressly said by Lord Brougham to be decided as a question of Scottish law. And even as an adjudication under the law of Scotland, which is founded upon the civil law, it has been thought open to question. See Story on Part. § 24, and note. Of Peacock *v.* Peacock, which stands alone among the common-law authorities, Lord Eldon, who had directed the issue, said: "The result of the issue that was directed appears to be extraordinary. The proposition being that the son was interested in some share, not exceeding a moiety, the jury in some way, upon the footing of a *quantum meruit*, held him entitled to a quarter. I have no conception how that principle can be applied to a partnership." Stewart *v.* Forbes, 1 McN. & G. 137; Webster *v.* Bray, 7 Hare, 159; M'Gregor *v.* Bainbrigge, 7 Hare, 164 n. In this country, it never seems to have been controverted, that in the absence of any contract upon the subject, the partners were interested in equal proportions, however different or unequal their contributions to the joint concern. Gould *v.* Gould, 6 Wend. 263; Taylor *v.* Taylor, 2 Murph. 70; Conwell *v.* Sandidge, 5 Dana, 210, 211; Lee *v.* Lashbrooke, 8 Dana, 214; Jones *v.* Jones, 1 Ired. Eq. 332; Honore *v.* Colmesnil, 1 J. J. Marsh. 506; Turnipseed *v.* Goodwin, 9 Ala. 372; Donelson *v.* Posey, 13 Ala. 752, 772; Stein *v.* Robertson, 30 Ala. 286, 292; Roach *v.* Perry, 16 Ill. 37. So, if a shipment is made to partners, they are held by the Prize Court to take in equal moieties, unless upon the original papers a different proportion appears. The San Jose Indiano, 2 Gall. 268, 303.

It is to be observed that, in the above cases, no distinction is taken between the property and the profits of a firm, as regards the application of the presumption of an equality of interest between the partners. In Farrar *v.* Beswick, 1

§ 180. **Insurance of Partnership Property.**—[The personal property of a partnership may be insured and the policy taken out in the firm name. When the property of a firm is insured under a policy which forbids assignment of the property insured, it often becomes a question whether certain dealings by a partner with his interest will avoid the policy. Since the partnership is the real owner, and one partner cannot transfer any interest in the property, but only his right to an account, it would seem that a sale of his interest in the partnership should not be held to be an assignment of property; and therefore that the policy should not become void under a clause forbidding assignment of the property insured, by sale or otherwise.

In accordance with this view the better opinion is that where a partner conveys his interest to a copartner the policy is not avoided under such a clause.[1] The same reasoning would seem to apply to a conveyance of his interest by a partner to a third person. The partnership alone can transfer a chattel; the partner transfers only his right to an account. There is some authority for such a rule;[2] but the prevailing view would seem to be that the policy is avoided by such a transfer.[3]

Under such a clause if a sole owner insures property, and then forms a partnership with a stranger, putting in the property as capital, it has been held that the policy is not avoided, but the assured may recover to the extent of the interest remaining in him.[4]

Where on the other hand it is provided that if the title of the

Moody & R. 527, the presumption that the several partners were equally interested, was applied as to the stock only; so also, in Gould *v.* Gould, 6 Wend. 263; Donelson *v.* Posey, 13 Ala. 772. See Penny *v.* Black, 9 Bosw. 310.

[1] Drennen *v.* London Assurance Corp., 20 F. R. 657; Dermani *v.* Home Ins. Co., 26 La. Ann. 69; Powers *v.* Guardian Ins. Co., 136 Mass. 108; Pierce *v.* Nashua Ins. Co., 50 N. H. 297; Combs *v.* Shrewsbury Ins. Co., 34 N. J. Eq. 403 (*semble*); Hoffman *v.* Aetna Ins. Co., 32 N. Y. 405 (overruling Bodle *v.* Chenango Co. Ins. Co., 2 N. Y. 53); West *v.* Citizens' Ins. Co., 27 Oh. St. 1. (So even of a release by one tenant in common to the other. Lockwood *v.* Middlesex Assurance Co., 47 Conn. 553.) *Contra*, Finley *v.* Lycoming Ins. Co., 30 Pa. 311; Wood *v.* Rutland & Addison Ins. Co., 31 Vt. 552 (*semble*); Keeler *v.* Niagara Ins. Co., 16 Wis. 523 (*semble*). In Hobbs *v.* Memphis Ins. Co., 1 Sneed, 444, the assignee partner was allowed to recover only for his original interest.

[2] West *v.* Citizens' Ins. Co., 27 Oh. St. 1 (*semble*). See Powers *v.* Guardian Ins. Co., 136 Mass. 108.

[3] Drennen *v.* London Assurance Corp., 20 F. R. 657 (*semble*); Shuggart *v.* Lycoming Ins. Co., 55 Cal. 408.

[4] Scanlon *v.* Union Ins. Co., 4 Biss. 511; Cowan *v.* Iowa State Ins. Co., 40 Ia. 551; Manley *v.* Ins. Co. of North America, 1 Lans. 20. But query. See McEwan *v.* Western Ins. Co., 1 Mich. N. P. 118, where, however, the policy forbade a change of title.

insured property is transferred *or changed* the policy shall be void, it seems to be pretty generally agreed that the transfer of a partner's interest in the property changes the title, and avoids the policy.[1]

Since the policy is in the nature of a specialty, only the parties to it can sue; and therefore though one partner has assigned his interest, he must join in the action as a party plaintiff.[2]

Where the policy was to be void if the party assured was not sole and unconditional owner of the goods for his own use, it was held that a surviving partner could not recover on a policy taken out by him, since he held in trust.[3]]

§ 181. **Good-Will.** — There is yet another thing which is certainly, in some respects, partnership property, but which it is not so easy to define; and this is the good-will of the firm.[4] A dis-

[1] Dix *v.* Mercantile Ins. Co., 22 Ill. 272; Hartford Ins. Co *v.* Ross, 23 Ind. 179; Hathaway *v.* State Ins. Co., 64 Ia. 229, 20 N. W. 164. So of course on a dissolution and division of the assets, Dreher *v.* Aetna Ins. Co., 18 Mo. 128; upon partition between co-tenants, Barnes *v.* Union Ins. Co., 51 Me. 110; and upon conveyance of an undivided interest in individual property. Western Massachusetts Ins. Co. *v.* Riker, 10 Mich. 279. But there is no change of title upon the appointment of a receiver of the partnership assets, for title remains in the partners. Keeney *v.* Home Ins. Co., 71 N. Y. 396; and there is at least one decision to the effect that a sale of his interest by one partner to another is not such change of title as will avoid a policy. Burnett *v.* Eufaula Ins. Co., 46 Ala. 11. Query whether the decision may not be supported.

[2] Fireman's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139; Tate *v.* Citizens' Ins. Co., 13 Gray, 79.

[3] Crescent Insurance Co. *v.* Camp, 64 Tex. 521.

[4] *Good-will:* — Good-will is defined by Lindley as "the benefit arising from connection and reputation;" and its value to be "what can be got for the chance of being able to keep that connection and improve it." 1 Lind. Part. * 439. Whatever the terms by which we define it, it seems that so far as it has a transferable value, it consists in the additional value which a business possesses when it can be sold as "a going concern." In order to preserve the good-will, the business must be kept in the condition so described. Wedderburn *v.* Wedderburn, 22 Beav. 84. Good-will is more than the mere habituation of customers to a certain locality (which seems to have been the idea of Lord Eldon, Cruttwell *v.* Lye, 17 Ves. 335). If business premises are burned, for instance, the fire cannot destroy the good-will. The good-will inheres in the business, not in the locality; and though the place of business is removed, the good-will continues. Churton *v.* Douglas, Johns. 174. But see Musselman's Appeal, 62 Pa. 81. The good-will of an inn is however local. Chittenden *v.* Witbeck, 50 Mich. 401, 15 N. W. 526; Elliot's Appeal, 60 Pa. 161. It is sometimes said that there is good-will in a professional practice, as for instance, that of a physician. See Warfield *v.* Booth, 33 Md. 63. It is doubtful, however, if this is properly called good-will. A sale of such an interest by one physician to another is nothing more than the agreement of the selling party to retire from practice and to recommend his patients to his successor. Hoyt *v.* Holly, 39 Conn. 326. See Dwight *v.* Hamilton, 113 Mass. 175.

The good-will of an established business is now clearly recognized as property; so much so, that a wrongful injury to a man's business, though no other injury is suffered, constitutes an actionable tort. Riding *v.* Smith, 1 Ex. D. 91; Temperton *v.* Russell,

tinction has been taken, in this respect, between the interest of a partnership resting on the contracts of the firm with a third

37 Sol. Jour. 423. An assignment of an interest in the good-will of a business is a conveyance of property, and must be stamped as such. Potter *v.* Commissioner, 10 Ex. 147.

Since the good-will of a business is property, the good-will of a business conducted by a partnership is evidently firm property, and cannot be used by one member of the firm as his individual property. So long as the firm business continues, it is like any of the assets of the firm; it may be transferred by the combined action of all the partners. Cruess *v.* Fessler, 39 Cal. 336; Herfort *v.* Cramer, 7 Col. 483; Wallingford *v.* Burr, 17 Neb. 137. It cannot, of course, be transferred by an individual partner. Thus, a devise by one partner of his interest in the good-will, apart from any interest in the business, is void. Robertson *v.* Quiddington, 28 Beav. 529. Being incorporeal, it cannot be seized on execution and sold by a sheriff. Helmore *v.* Smith, 35 Ch. D. 436 (C. A.). It exists entirely apart from the stock in trade, and does not necessarily pass with a sale of the stock. Rawson *v.* Pratt, 91 Ind. 9. But see McFarland *v.* Stewart, 2 Watts, 111.

A sale of all interest in a business, or in all the assets of a business, transfers the good-will. Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713; Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714.

Upon dissolution it is evident that some immediate disposition must be made of the good-will, or else, the business transactions having entirely ceased, the good-will is lost. If the dissolution is from any cause but death, either partner has a right to secure a sale of the good-will for the benefit of the partnership. Bradbury *v.* Dickens, 27 Beav. 53; Pawsey *v.* Armstrong, 18 Ch. D. 698; Sheppard *v.* Boggs, 9 Neb. 257, 2 N. W. 370; Bininger *v.* Clark, 60 Barb. 113; Dayton *v.* Wilkes, 17 How. Pr. 510. It would seem to be within the power of the court to appoint a receiver, in order that the business may be kept up and sold as a "going concern." Turner *v.* Major, 3 Giff. 442; Taylor *v.* Neate, 39 Ch. D. 538; Levi *v.* Karrick, 8 Ia. 150; Marten *v.* Van Schaick, 4 Paige, 479.

In case of death, the good-will does not survive beneficially to the surviving partner; and if the survivor continues the business without a break, he will be obliged to account for the value of the good-will. Wedderburn *v.* Wedderburn, 22 Beav. 84, 104; Smith *v.* Everett, 27 Beav. 446; Mellersh *v.* Keen, 28 Beav. 453; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Rammelsberg *v.* Mitchell, 29 Ohio St. 22.

The value of the good-will in such cases is very materially affected by the circumstances about to be stated. Hall *v.* Barrows, 33 L. J. Ch. 204, and cases *supra*.

Where the good-will of a business is sold, it would seem that the sellers should be allowed to do nothing to detract from the value of the good-will. Unless the purchaser can prevent the members of the selling firm from entering into business again in the neighborhood, much of the value of the good-will is lost. Yet it is held that any member of the selling firm may enter upon the same business, in the same neighborhood. Cruttwell *v.* Lye, 17 Ves. 335; Shackle *v.* Baker, 14 Ves. 468; Harrison *v.* Gardner, 2 Madd. 198; Kennedy *v.* Lee, 3 Mer. 441; Porter *v.* Gorman, 65 Ga. 11; Bergamini *v.* Bastian, 35 La. Ann. 60 (sale by sole trader); Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713. He may even solicit the customers of the old firm. Pearson *v.* Pearson, 27 Ch. D. 145 (C. A.); Vernon *v.* Hallam, 34 Ch. D. 748 (overruling Labouchere *v.* Dawson, L. R. 13 Eq. 322; Ginesi *v.* Cooper, 14 Ch. D. 596; Leggott *v.* Barrett, 15 Ch. D. 306). And may advertise his connection with the business. Hookham *v.* Pottage, L. R. 8 Ch. 91; Labouchere *v.* Dawson, L. R. 13 Eq. 322. See *post*, § 347, note (*x*). So where a retiring partner sells the business, including the good-will, to the continuing partners, the former may enter again into the same business, in an adjoining shop, and solicit the old customers. Churton *v.* Douglas, Johns. 174; Cottrell *v.* Manufacturing Co., 54 Conn. 122, 6 Atl. 791; Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446;

party, and that which has no such foundation. (*r*) We have much doubt, however, whether this distinction rests on good

(*r*) Lord Eldon has thus stated and explained this distinction: "Where two persons are jointly interested in trade, and one, by purchase, becomes sole owner of the partnership property, the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit essentially connected with the sole ownership. In the case of the trade of a nursery-man, for instance, the mere knowledge of the fact that he is sole owner of the property, and in the sole and exclusive management of the concern, gives him an advantage which the other partner, supposing him to carry on the same trade, with other property not the partnership property, would not possess. In that sense, therefore, the good-will of a trade follows from and is connected with the fact of sole ownership. There is another way in which the good-will of a trade may be rendered still more valuable: as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account." Kennedy *v.* Lee, 3 Mer. 452.

Dayton *v.* Wilkes, 17 How. Pr. 510. But the selling partner or partners thus re-entering into business must not do so in such a way as to seem to be carrying on the old business · as by advertising that he has removed from the old place to the new. Hall's Appeal, 60 Pa. 458. This when done is usually done by using the old firm name or a similar one; which is accordingly forbidden. Myers *v.* Buggy Co., 54 Mich. 215, 19 N. W. 961; Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446.

In accordance with this general rule, a surviving partner may do business without rendering himself liable to the estate of the deceased, provided he does not engage in business in such a way as to continue the old business, thereby gaining an advantage. Davies *v.* Hodgson, 25 Beav. 177; Smith *v.* Everett, 27 Beav. 446; Mellersh *v.* Keen, 28 Beav. 453; Rammelsberg *v.* Mitchell, 29 Ohio St. 22. The same is true of a liquidating partner. Musselman's Appeal, 62 Pa. 81. Or of either partner, upon dissolution without agreement as to a continuance of the business. Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707.

In Williams *v.* Farrand, 88 Mich. 473, 483, 50 N. W. 446, McGrath, J., defends the established rule as follows. "A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. It is capital already invested, and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time, at least, it is capital awaiting investment, or invested, but earning nothing. The retiring partner takes these chances or disadvantages."

In Massachusetts there seemed a tendency, at one time, to hold that a sale of the good-will of a business carried with it an agreement not to compete in such a way as to derogate from the value of the thing granted. Thus the court restrained from competing the seller of the good-will of a medical practice. Dwight *v.* Hamilton, 113 Mass. 175. And of a milk-route. Munsey *v.* Butterfield, 133 Mass. 492. It has since been held, however, that these decisions turned on the exceptional nature of the business sold. Hoxie *v.* Chaney, 143 Mass. 592, 596, 10 N. E. 713.

If the sale of a business with its good-will includes an agreement by the seller to

authority, or good reason. The claims or interests of the partnership arising from contracts made with them, or on their vested and exclusive rights, however acquired, seem to be excluded from the meaning of "good-will;" for the only proper signification of the word must be, that benefit or advantage which rests only on the *good-will*, or kind and friendly feeling of others, and which, of course, can be wholly lost without giving rise to any legal right, or ground of complaint. This simple meaning of "good-will" we take to be the true technical and legal meaning of the word. Lord Eldon defined this about as well as it can be defined, when he said, that "the good-will of a trade is nothing more than the probability that the old customers will resort to the old place;" although this definition is open to the objection that it localizes that interest which we call good-will, and makes it altogether dependent upon place, and wholly independent of persons. (*s*) This is, nevertheless, an exact statement of the legal meaning of good-will. It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period, and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope, grounded upon a probability.

There is some difficulty, no doubt, in treating this hope as property; but if that which is, in fact, a valuable interest, were not treated as one, injustice would be done, and therefore both law and equity treat the good-will of a business as a valuable pecuniary interest, (*t*) although it differs in important respects from tangible property, or legal choses in action. Thus, it cannot be valued as a separate property, or, at least, is not

(*s*) Cruttwell *v.* Lye, 17 Ves. 335, 346. This definition, as we have above intimated, makes good-will local, and an incident of *the place where* business has been carried on, and not of the *persons by whom* it has been conducted. It is in this sense, only, that good-will is recognized by the law as a pecuniary interest. Hence the sale of a trade with the good-will leaves the vendor at liberty to set up the same trade in any other situation. Shackle *v.* Baker, 14 Ves. 468; Harrison *v.* Gardner, 2 Madd. 198, 219; Cruttwell *v.* Lye, 1 Rose, 123; 16 Am. Jur. 87, 92.

(*t*) Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Williams *v.* Wilson, 4 Sandf. Ch. 379. As to how far a name which the firm have used in their business, and have made valuable, may be treated as of the nature of good-will, see *post.*

refrain from competing, or from carrying on business in the neighborhood, this agreement will be enforced by the court. Bassett *v.* Percival, 5 All. 345; Angier *v.* Webber, 14 All. 211; Grow *v.* Seligman, 47 Mich. 607; Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446. See Vernon *v.* Hallam, 34 Ch. D. 748.

by the law, although it often is by parties themselves, (*u*) and might be so valued without difficulty in equity, although it is said that a contract for the sale of a good-will will not be enforced in equity. (*v*) The executor of a deceased partner can realize the share of the deceased in the good-will, only when he can compel a sale of the stock and premises, and then the good-will goes with them. (*w*) For, as a general rule, by the conveyance of a shop or store, the good-will of the business carried on in it passes, although nothing is said about the good-will. (*x*) And if an executor cannot compel a sale of the premises, or, as it seems, if the premises are not, in fact, sold, the executor gets no advantage from the good-will, for that remains entirely with the surviving partners who carry on the same business in the same place. And if the executor attempts to use the name of the old firm in such wise as to secure to himself a portion of the good-will, it is said that he will be restrained by injunction. (*y*) But this can only apply so far as to prevent fraud on his part. If he continues the same business in another place, and advertises the fact that he is the executor of a partner, and carries it on with the same facilities and the same advantage to customers as was done by the old partnership, there is certainly no right in the surviving partners, who have paid nothing for the good-will, to prevent his doing so.

From these and similar difficulties, it has been said by high authorities that the good-will of a business is not partnership property, and remains wholly with the surviving partners. (*z*)

(*u*) Harrison *v.* Gardner, 2 Madd. 198.

(*v*) In Baxter *v.* Connoly, 1 Jac. & W. 580, Lord Eldon said: "The court certainly will not execute a contract for the sale of a good-will; at the same time, it will not enjoin against any proceeding at law under such an agreement. Suppose, for instance, there is a contract for the good-will of a shop; it cannot be conveyed, and the court would say, Go and make what you can of it at law; if you can recover, very well, we won't prevent you; if you cannot, very well again, we won't assist you." Coslake *v.* Till, 1 Russ. 376, 378; Bozon *v.* Farlow, 1 Mer. 459. See Shackle *v.* Baker, 14 Ves. 468.

(*w*) Crawshay *v.* Collins, 15 Ves. 224, 227; Featherstonhaugh *v.* Fenwick, 17 Ves. 309, 312; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 70.

(*x*) Chissum *v.* Dewes, 5 Russ. 29. See Kennedy *v.* Lee, 3 Meriv. 441, 452.

(*y*) Lewis *v.* Langdon, 7 Sim. 421. See Staats *v.* Howlett, 4 Denio, 559. A retired partner, who sets up in business on his own account, will not be allowed so to advertise his former connection as to lead the public to believe that he is carrying on the business of the old firm. Hookham *v.* Pottage, L. R. 8 Ch. 91. Nor will a partner continuing the business be allowed to use the old firm name, to the prejudice of the retiring partner. McGowan, &c. Co., *v.* McGowan, 22 Ohio St. 370. See also, as to use of firm name after dissolution, Benninger *v.* Clarke, 10 Abb. Pr. N. S. 264.

(*z*) In Hammond *v.* Douglas, 5 Ves. 539, the Lord Chancellor, Loughborough, "was clearly of opinion, that upon a partnership without articles the good-will

We cannot but think, however, that an American decision affirming it to be partnership property, and capable of division, rests on better reason.(*a*) And it would always be in the power of equity to ascertain its value, by evidence offered to a Master; or, at least, if there can be no agreement, by a sale of the good-will, and if that be inseparable from the shop or store, then that might be sold also, for this, if for no other reason. It has been held, in another American case, that a receiver of a partnership may be directed by the court to carry the business on, in order to preserve a valuable good-will. (*b*)

A distinction has been taken in this respect between the good-will of a partnership in trade, and that of a professional partnership. Lawyers or physicians may become partners; but the good-will attached to such a firm must be considered more as a personal than as a local thing. (*c*) It is not a probability that the old customers will go to the old place, but to the same persons, wherever they may be. And, if one died, it would be very hard — as has been said by an English equity judge — to require the other to give up his business and sell out, in order to determine the value of the good-will. (*d*) And probably the business-office which successful lawyers or physicians had occu-

survives; and a sale of it cannot be compelled by the representatives of the deceased partner, being the right of the survivor, which the law gives him to carry on the trade. It is not partnership stock of which the executor may compel a division." See Lewis *v.* Langdon, 7 Sim. 421. Chancellor Kent gives his sanction to this doctrine; 3 Kent Comm. [64]; and though it was doubted by Lord Eldon in Crawshay *v.* Collins, 15 Ves. 224, 227, yet this doubt has been considered overruled by the case of Lewis *v.* Langdon, *supra.*

(*a*) Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68.

(*b*) Marten *v.* Van Shaick, 4 Paige, 479. The court directed the receiver to carry on the business in this case; the very thing which was considered by the Vice-Chancellor in 7 Sim. 421, to be beyond the power of equity, and therefore to show that the good-will of a business could not belong to the firm, but remained to the survivor. See Williams *v.* Wilson, 4 Sandf. Ch. 379.

(*c*) Though, for the reason stated in the text, there is properly speaking no good-will belonging to professional partnerships, yet it is very common for attorneys, solicitors, physicians, &c., to agree, upon selling out, to secure their customers to those who succeed them. The policy of sanctioning agreements of this character has been doubted. But their validity is not questioned; though equity, it seems, will not specifically enforce them. Candler *v.* Candler, Jac. 231; Whittaker *v.* Howe, 3 Beav. 389, 393; Bozon *v.* Farlow, 1 Meriv. 459.

(*d*) Farr *v.* Pearce, 3 Madd. 78. Here, Farr & Pearce had been partners in the business of surgeon, apothecary, &c., under articles. Sir John Leach, V. C., said: "When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and, where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships." Another case is mentioned by Collyer as having been decided on the same principle. Spicer *v.* James, Rolls, M. T. 1830; Collyer on Part. § 164.

pied would bring but little more for their occupancy. There are instances which might fall between these in this respect. The business of an apothecary, in this country, is almost altogether commercial. In England, it is, in great proportion, the business of a medical practitioner. Here, therefore, the good-will might be treated as a commercial one; there, as a professional one. (*e*)

§ 182. **Trade Name and Trade-Marks.** — The question of the right to use a trade name has come before the courts, and it would seem that this could not be treated as of the nature of good-will, or as a valuable interest which the court could recognize and protect, mainly from the want of adequate power in a court. (*f*)[1] But of late years new and excellent principles and

(*e*) See Farr *v.* Pearce, in preceding note. In 16 Am. Jur. 87, the good-will of a newspaper establishment is considered to stand on the same footing as the good-will of a professional business. See Keene *v.* Harris, cited in 17 Ves. 338, 342. And in Holden *v.* M'Makin, 1 Pars. Sel. Cas. 270, 282, it is held that a newspaper is subject to the same rule as a commercial partnership.

(*f*) See Lewis *v.* Langdon, 7 Sim. 421; Webster *v.* Webster, 3 Swanst. 490.

[1] *Firm name.* We have already seen (*ante*, § 97) that it is the right of a partnership to take any name it pleases; and this name may, in the absence of statute, include the names of persons not partners, and of none who are partners. This is sometimes forbidden by statute (*ante*, § 176). The right of a firm to include in its firm name the name of a person not a member is however subject to exceptions. Thus it is provided by statute in Massachusetts (Pub. Stats. ch. 76, § 6) that no one can use the name of another in business without the written consent of the person named or his representative. Whether the name used is that of any particular bearer of the name is a question of fact, to be proved by the person objecting. Hallett *v.* Cumston, 110 Mass. 29. When consent is thus given to a person, who afterwards takes a partner, the latter cannot continue the use of the name after the death of him to whom the consent was given. Lodge *v.* Weld, 139 Mass. 499, 2 N. E. 95. Even in the absence of statute, the use of the name of a retiring partner in a firm name, in such a way as to subject the retiring partner to liability or to the possibility of being sued, may be restrained by him. Scott *v.* Rowland, 26 L. T. Rep. 391; Gray *v.* Smith, 43 Ch. D. 208 (C. A.); Peterson *v.* Humphrey, 4 Abb. Pr. 394; McGowan Bros. P. & M. Co. *v.* McGowan, 22 Ohio St. 370.

Where a firm name has been adopted and used by a partnership, it may have obtained a value in itself, similar to the value of a good-will or of a trade-mark, which the court ought to protect. And during the life of the firm the name will be so protected, by preventing strangers who have no right to do so from using it. This will be done as a matter of course if the name is not that of the party who adopts it. Other considerations, however, apply when the person to be restrained himself bears the name used. No man can be restrained from using his own name in business, simply because another has a right to use the same name in the same business; in order to have him restrained from using his own name it must be shown that the use complained of is for the purpose and with the effect of deceiving the public. Burgess *v.* Burgess, 3 DeG. M. & G. 896; Turton *v.* Turton, 42 Ch. D. 128; Iowa Seed Co. *v.* Dorr, 70 Ia. 481, 30 N. W. 866; Russia Cement Co. *v.* Lepage, 147 Mass. 206, 17 N. E. 304; Meneely *v.* Meneely, 62 N. Y. 427; Carmichel *v.* Latimer, 11 R. I. 395. "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it

rules have been adopted in England and in this country in respect to trade-marks. They are considered property, so far that parties using them falsely and injuriously are now certainly liable in damages to those who have a right to them, and

does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not." Turner, L. J., in Burgess *v.* Burgess, 3 DeG. M. & G. 896, 905. One who has disposed of the right to use his own name as a *quasi*-trade-mark may however be restrained from using it himself. Horton Mfg. Co. *v.* Horton Mfg. Co. 18 F. R. 816; Russia Cement Co. *v.* Lepage, 147 Mass. 206, 17 N. E. 304. See McLean *v.* Fleming, 96 U. S. 245.

The most difficult question as to the right in a firm name arises upon dissolution, upon a sale of the whole or part of a business. The better view would appear to be that the purchaser of a business gets no right, without an express agreement, to use the name of the selling firm: whether he is a stranger or one of the selling firm. Gray *v.* Smith, 43 Ch. D. 208 (C. A.); Horton Mfg. Co. *v.* Horton Mfg. Co., 18 F. R. 816 (*semble*); Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446. But see Levy *v.* Walker, 10 Ch.D. 436 (C. A.); Holmes *v.* Holmes, B. & A. Mfg. Co., 37 Conn. 278; Adams *v.* Adams, 7 Abb. N. C. 292. Nor can the purchaser advertise himself as "successor" of the seller. Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446; Morgan *v.* Schuyler, 79 N. Y. 490. If it is desired to secure the right to use the firm name, the purchaser should get an agreement that he may use it. Where such an agreement is made, the purchaser cannot in his turn (unless the name is a trade-mark) transfer his right to use it to another. Horton Mfg. Co. *v.* Horton Mfg. Co., 18 F. R. 816. See Lodge *v.* Weld, 139 Mass. 499, 2 N. E. 95. Whether the right to the use of the name passes or not is often immaterial. If the name is composed of the surnames of individuals, it is clear that no one that does not bear the name can object to the use of it. Rogers *v.* Taintor, 97 Mass. 291. Unless, therefore, the name were used in such a way as to deceive, the purchaser could not usually be prevented from using it.

Where there is a dissolution, but no sale of the business, the question is more free from difficulty. If a firm is dissolved during the lifetime of the partners, with no provision as to the use of the firm name, it seems clear that either partner may use the old firm-name, as he is entitled to continue the business, subject to the limitation, however, that he must not involve his copartner in liability. Banks *v.* Gibson, 34 Beav. 566; Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707. But it would seem to be in the power of either partner, by filing a bill for an account, to have the value of the firm name brought into the firm assets.

It has been decided in some cases that the right to use the firm name survived; and since a surviving partner could not subject the estate to any liability by using it, he might do so. Lewis *v.* Langdon, 7 Sim. 421; Robertson *v.* Quiddington, 28 Beav. 529; Staats *v.* Howlett, 4 Den. 559. But it would seem that if the name has any value, the firm and not the surviving partner is entitled to the benefit of it; and therefore that if the surviving partner continues to use the firm name the estate of the deceased, while not, perhaps, entitled to prevent the use of it, may require the survivor to account for its value. Fenn *v.* Bolles, 7 Abb. Pr. 202. The earlier cases must probably be considered overruled, along with the old decisions which held that the good-will survives.

A former partner, whether or not he has disposed of the good-will and right to the firm name, may in a proper manner advertise his connection with the old firm, as that he is "late of" the firm. Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446; Bininger *v.* Clark, 60 Barb. 113; Peterson *v.* Humphrey, 4 Abb. Pr. 394. But this may not be done in a way to deceive the public, as by making the words "late of" so inconspicuous as to be overlooked. Hookham *v.* Pottage, L. R. 8 Ch. 91; Smith *v.* Abbott, 5 Abb. N. C. 274.

equity will restrain this unlawful use. (*g*) [1] We cannot but think that this right partakes so much of the nature of good-will that it will be included within that term, or otherwise recognized and protected by courts, if they have power to do so. (*h*) Of copy-rights and patent-rights no question is made: they often form a valuable portion of the stock of bookselling and other commercial partnerships. (*i*)

§ 183. **Lien of Partner on Firm Property.** — It is said in some cases, and in text-books of high authority, that each partner has a lien on the common property, first, to secure the payment of the common debts, for which each partner is liable *in solido*, and then to secure to him his own share in the partnership property, after the debts are all paid. And it is also said that this lien may be followed out, and made to attach, in some cases, to the proceeds of partnership property, which has been wrongfully sold. We should consider this topic here, but it is closely connected with another principle generally stated with it; namely, that it is through this lien that the right of creditors of the partnership to the property of the partnership, as pledged to the payment of their debts, is to be worked out.

This is much the most important aspect of this topic of lien, in a practical point of view; and, regarding the doctrine of

(*g*) The right and property of a firm to and in a trade-mark are of course the same as that of an individual. The following cases upon the general subject may be consulted as exemplifying the proposition of the text. Taylor *v.* Carpenter, 2 Woodb. & M. 1; 11 Paige, 292, 2 Sandf. Ch. 603, 3 Story, 458; Amoskeag Manufacturing Co. *v.* Spear, 2 Sandf. 599; Coats *v.* Holbrook, 2 Sandf. Ch. 586; Knott *v.* Morgan, 2 Keene, 213; Rodgers *v.* Nowell, 5 C. B. 109; Farina *v.* Silverlock, 1 DeG. & J. 434. The cases are well collected and examined in note to 2 Kent (9th ed.), [372]. See also 6 West. L. J. 337.

(*h*) In Hine *v.* Lart, 10 Jur. 106, it seems to have been considered by the court that a trade-mark was partnership property. See Lewis *v.* Langdon, 7 Sim. 421. Equity will not however decree the sale of a partner's interest in a firm brand or trade-mark, its value being too insubstantial upon which to set a value. Taylor *v.* Bemis, 4 Biss. 406.

(*i*) Parkhurst *v.* Kinsman, 1 Blatchf. 488, 495; Penniman *v.* Munson, 26 Vt. 164; Lovell *v.* Hicks, 2 Younge & C. 481.

[1] *Trade-marks.* When one buys another's interest in a business he buys the right to use and to prevent others from using the trade-marks belonging to the business. Publishing Co. *v.* Gage, 11 Can. 306; Hall *v.* Barrows, 33 L. J. Ch. 204; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713; Williams *v.* Farrand, 88 Mich. 473, 50 N.W. 446; Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714. Though a mere sale of the chattels or real estate of the business by one partner to another without any agreement as to the business, does not carry with it an exclusive right to the good-will or trade-marks: and the selling partner may use the latter. Smith *v.* Walker, 57 Mich. 456, 24 N. W. 830, 26 N. W. 783; Huwer *v.* Dannenhoffer, 82 N. Y. 499; Hazard *v.* Caswell, 93 N. Y. 259. See Kidd *v.* Johnson, 100 U. S. 617, 620.

lien as of more moment to the creditors than to the partners themselves, we defer the consideration of it until we treat of the rights and remedies of third persons against the firm. And then we shall state our dissent from some of the views frequently expressed of this lien, and endeavor to show how it needs to be qualified or modified before it can harmonize with the law of partnership, or the general law-merchant.

CHAPTER VIII.

OF THE REMEDIES OF PARTNERS INTER SE.

SECTION I.

GENERAL CONSIDERATIONS.

§ 184. **Nature of Action by or against Partnership.** — The relation of partners, and the legal *status* of a partnership, are peculiar; and the remedies which each partner has against another are equally so, and it is sometimes difficult to define them. A partnership is not a corporation, nor a legal person; and yet the common law yields so far to the reasons and necessities of the law-merchant as to consider the partnership as a *quasi* corporation, or, at least, to recognize it as having some kind and measure of personality. Perhaps it might be better if our law, like the Scotch law (founded on the civil law), carried this personality so much farther as to permit actions by or against the firm, without reference to the individual partners. (*a*) In some instances, it might be useful and safe to permit (as the Scotch law permits) (*aa*) a partner to proceed against a partnership, or the firm against a partner, much as may be done in the case of a corporation. Nothing of that kind is known to the common law; (*b*) and it may be that equity has now established principles and methods which practically answer as well.[1] But in equity an

(*a*) 2 Bell Comer. Bk. 7, V. p. 510

(*aa*) Ibid.

(*b*) Upon the ground, that the same person cannot in the same suit be both plaintiff and defendant of record, no action can be maintained between one and the firm of which he is a member. De Tastet *v.* Shaw, 1 B. & Ald. 664; Neale *v.* Turton, 4 Bing. 149; Teague *v.* Hubbard, 8 B. & C. 345; Chadwick *v.* Clarke, 1 C. B. 700; Westcott *v.* Price, Wright, 220; Tinal *v.* Bright, Minor, 103; Estes *v.* Whipple, 12 Vt. 373; Bracken *v.* Kennedy, 4 Ill. 558, 564; Myrick *v.* Dame, 9 Cush. 248, 254; Homer *v.* Wood, 11 Cush. 66; Banks *v.* Mitchell, 8 Yerg. 111. Though a partner, payee of a negotiable note made by his firm, cannot sue the makers, his indorsee may recover upon it. Smith *v.* Lusher, 5 Cow. 688; Thayer *v.* Buffum, 11 Met. 398; Davis *v.* Briggs, 39 Me. 304; Fulton *v.* Williams, 11 Cush.

1 Where a partner makes a loan to the firm and takes a firm note, although of course he cannot sue the firm upon it, it is a perfectly valid note. If he indorses

action to recover money wrongfully paid to defendant by a partner should make the defaulting partner a party. (*bb*) In this country, where equity and law have, in many States, approached closely together, and seem to be tending towards unity, there may be still less need of any remedies in addition to those now made use of. But many questions in the use of these remedies certainly demand better and more certain answers than can now be made. They, however, can be given authoritatively only by adjudication, or by legislation.

§ 185. **Partnership Questions not generally cognizable at Law.** — As a general rule, the law will not take cognizance of questions which relate to the partnership between living partners. (*c*) [1] The

108, 110. So, if the partnership be payee of a note made by one of the partners, the technical impediment to a suit on the note is removed by actual negotiation, and the holder may claim a valid title through the indorsement of the firm. Per Shaw, C. J., in Parker *v.* Macomber, 18 Pick. 509. See Babcock *v.* Stone, 3 McLean, 172. And where one who is a member of two firms makes a promissory note in the name of one firm, payable to a person who is a member of the other firm, the payee may sue and recover upon it at law; and the admissions of the common member of both firms cannot be given in evidence to defeat a recovery on the instrument. Moore *v.* Gano, 12 Ohio, 300. See Baring *v.* Lyman, 1 Story, 423. But the assignee of a partner who is the payee of a *non-negotiable note* made by the partnership, cannot sue on the note, since his assignor could not. Hill *v.* McPherson, 15 Mo. 204. If a firm is the first indorser of a note, the holder, being a partner therein, cannot sue a subsequent indorser on the note: it being a good answer to the suit of the holder, that, as a member of the copartnership, he stands in the relation of a prior indorser. Decreet *v.* Burt, 7 Cush. 551.

(*bb*) Atkinson *v.* Mackreth, L. R. 2 Eq. 570; [Penniman *v.* Jones, 58 N. H. 447.]

(*c*) Or as the rule is laid down by Abbott, C. J.: "One partner cannot main-

it to a purchaser for value, the latter may recover upon it. Roberts *v.* Ripley, 14 Conn. 543; Cutting *v.* Daigneau, 151 Mass. 297, 23 N. E. 839 (*semble*); Walker *v.* Wait, 50 Vt. 668. But the mere assignee of such a note or other claim cannot sue, since he must do so in the name of his assignor. Davis *v.* Merrill, 51 Mich. 480, 16 N. W. 864. Except in jurisdictions where an assignee of a claim may sue in his own name. Frank *v.* Anderson, 13 Lea, 695.

But where a firm note to a partner is merely indorsed to a formal party for purposes of suit, it is of course subject to all equities that exist against the partner. Wintermute *v.* Torrent, 83 Mich. 555, 47 N. W. 358. And it would seem that it could not in this case be enforced at all, since the partner's claim is always subject to the state of accounts between the firm and the partners. Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476; Cutting *v.* Daigneau, 151 Mass. 297, 23 N. E. 839. But see Carpenter *v.* Greenop, 74 Mich. 664, 42 N. W. 276.

So where a partner borrows money from the partnership and gives a note, though the firm cannot sue, its indorsee may do so; and in those jurisdictions where an assignee of a *chose in action* may sue in his own name, one to whom the mere claim of a firm against a partner for borrowed money is assigned may sue the partner. Bank of British N. Amer. *v.* Delafield, 126 N. Y. 410, 27 N. E. 797; (especially, as the court says, where the partner is shown to be indebted to the firm in a much larger amount.)

[1] Until accounts are settled and a balance struck, one partner cannot maintain

reasons for this are substantial and of much weight. One is, that if a partner calls on another to acknowledge or satisfy any

tain an action against his copartner for work and labor performed, or money expended on account of the partnership." Holmes *v.* Higgins, 1 B. & C. 76. It is unnecessary to adduce here the numerous authorities upon this point; for, as is said hereafter, the whole of this section consists simply in a statement of the exceptions to the general rule. We have already seen that, for his personal services in the affairs of the partnership, as a general rule, no partner is entitled to compensation, even as an item of account between the partners. For his advances and outlays in behalf of the firm, each partner is, indeed, entitled to the proper credits, whenever the partnership accounts are made up. But we have seen that he can maintain no action against the partnership for the amount of his expenditures, because he cannot be both plaintiff and defendant of record; nor against his copartners, for the reason stated hereafter in the text, that until an account of the partnership concerns is taken, it is impossible to tell whether he is really a debtor or creditor of the other partners. But, after a trial and verdict for the plaintiff. it is too late for the defendant to object that the subject-matter of the suit was a copartnership contract between him and the plaintiff. The objection should be made at the trial. Smith *v.* Allen, 18 Johns. 245. See Gomersall *v.* Gomersall, 14 Allen, 60; and Crotts *v.* Frigerio, 18 La. Ann. 283.

an action at law against another on a partnership claim. Broda *v.* Greenwald, 66 Ala. 538; Fisher *v.* Sweet, 67 Cal. 228, 7 Pac. 657; Price *v.* Drew, 18 Fla. 670; Bowzer *v.* Stoughton, 119 Ill. 47, 9 N. E. 208; Meredith *v.* Ewing, 85 Ind. 410; Lang *v.* Oppenheim, 96 Ind. 47 (but see Anderson *v.* Ackerman, 88 Ind. 481); Hall *v.* Clagett, 48 Md. 223; Learned *v.* Ayres, 41 Mich. 677, 3 N. W. 178; Arnold *v.* Arnold, 90 N. Y. 580; Elmer *v.* Hall, (Pa.) 23 Atl. 971; Dowling *v.* Clarke, 13 R. I. 134; O'Neill *v.* Brown, 61 Tex. 34. In accordance with the general rule, where a partner is to be paid for his services by the partnership, he cannot recover the amount from his copartner at law; his only remedy is an accounting. Holmes *v.* Higgins, 1 B. & C. 74; Milburn *v.* Codd, 7 B. & C. 419; O'Brien *v.* Smith, 42 Kas. 49, 21 Pac. 784; Stone *v.* Mattingly, (Ky.) 19 S. W. 402; Duff *v.* Maguire, 99 Mass. 300; Younglove *v.* Liebhardt, 13 Neb. 557, 14 N. W. 526; Weaver *v.* Upton, 7 Ired. 458; Hills *v.* Bailey, 27 Vt. 548. The same is true where a partner sells goods to the firm. Marks *v.* Stein, 11 La. Ann. 509; Remington *v.* Allen, 109 Mass. 47; Course *v.* Prince, 1 Mill C. R. 416. So where he lends money to the firm. Perring *v.* Hone, 4 Bing. 28; Colley *v.* Smith, 2 Moo. & R. 96; Mickle *v.* Peet, 43 Conn. 65; Springer *v.* Cabell, 10 Mo. 640; Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172; O'Neill *v.* Brown, 61 Tex. 34. So where he leases premises to the firm. Pio Pico *v.* Cuyas, 47 Cal. 174; Johnson *v.* Wilson, 54 Ill. 419. So where he pays out money for the use of the firm. Sadler *v.* Nixon, 5 B. & Ad. 936; Robson *v.* Curtis, 1 Stark. 78; Goddard *v* Hodges, 1 Cr. & M. 33; Brown *v.* Tapscott, 6 M. & W. 119; Ross *v.* Cornell, 45 Cal. 133; Crossley *v.* Taylor, 83 Ind. 337; Hennegin *v.* Wilcoxon, 13 La. Ann. 576; Phillips *v.* Blatchford, 137 Mass. 510; Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170; Harris *v.* Harris, 39 N. H. 45; Murray *v.* Bogert, 14 Johns. 318; Ives *v.* Miller, 19 Barb. 196; Torrey *v.* Twombly, 57 How. Pr. 149; McDonald *v.* Holmes, 22 Ore. 212, 29 Pac. 738; Leidy *v.* Messinger, 71 Pa. 177; Fessler *v.* Hickernell, 82 Pa. 150; Merriweather *v.* Hardeman, 51 Tex. 436.

Nor can a partner sue his copartner at law when the obligation of the latter runs to the firm. Thus where a partner receives money on account of the firm, his copartner cannot bring an action for his share. Fromont *v.* Coupland, 2 Bing. 170; Bovill *v.* Hammond, 6 B. & C. 148; Russell *v.* Byron, 2 Cal. 86; Stanton *v.* Buckner, 24 La. Ann. 391; Riarl *v.* Wilhelm, 3 Gill, 356; Smith *v.*

claim in which the partnership is interested, the plaintiff will either prevail and recover damages to which he must himself eventually contribute, or be defeated, and perhaps be obliged to pay to the defendant something which gives the plaintiff a right to call at once on the defendant to refund a part of what he pays. (*d*) The second reason is little more than a development or consequence of the first. It is, that no partner has a several and personal claim on any other partner for any matter in which the partnership is interested, because neither can the partners be separated, — all being interested, both as plaintiffs and as defendants, — nor can any claim or item of claim be separated from the other interests of the partnership. One partner may to-day pay much more or much less than the sum which would fall upon him to pay, in proportion either to the numbers of the partners, or to his share or interest in the concern. But yesterday he may have done just the reverse; and the charge or credit of yesterday must be brought into connection with the charge or credit of to-day, before it can be ascertained whether he has paid too much or too little, and therefore whether he may claim of the other partners, or they of him. But, to settle this question finally and justly, the charges and credits of all other days, and not only so, but of all the other partners, must be taken into consideration, before it can be ascertained whether the plaintiff has a valid claim against the defendant. (*e*)

(*d*) Milburn *v.* Codd, 7 B. & C. 419, 421.

(*e*) Lord Chancellor Cottenham explains the disability of partners to sue each other, in Richardson *v.* Bank of England, 4 Mylne & C. 171, 172. See Francisco *v.* Fitch, 25 Barb. 130; Morin *v.* Martin, 25 Mo. 360; Hammond *v.* Hammond, 20 Ga. 556; Wiggin *v.* Cummings, 8 Allen, 153.

Smith, 33 Mo. 557 (see Bethel *v.* Franklin, 57 Mo. 466); Towle *v.* Meserve, 38 N. H. 9; Young *v.* Brick, 3 N. J. L. (2 Penn.) 664; Graham *v.* Holt, 3 Ired. 300; Devore *v.* Woodruff, 1 N. Dak. 143, 45 N. W. 701. See Wright *v.* Cobleigh, 21 N. H. 339 (statutory). So where a partner buys goods of the firm, no action can be brought against him for the price of the goods by his copartner. Page *v.* Thompson, 33 Ind. 137; Ivy *v.* Walker, 58 Miss. 253. But see Bennett *v.* Smith, 40 Mich. 211.

But in some jurisdictions one partner is allowed to maintain an action for his share of the profits where the accounts may be easily adjusted, as where all the debts are paid, and nothing remains but to ascertain to whom the balance is due. See *post*, § 194; Clarke *v.* Mills, 36 Kas. 393, 13 Pac. 569; Wheeler *v.* Arnold, 30 Mich. 304; Aldrich *v.* Lewis, 60 Miss. 229. This is not infrequently allowed where the partnership was in a single transaction. Finlay *v.* Stewart, 56 Pa. 183; Meason *v.* Kaine, 63 Pa. 335; Kutz *v.* Dreibelbis, 126 Pa. 335, 17 Atl. 609; Fry *v.* Potter, 12 R. I. 542.

See an exhaustive collection of the authorities, Ames, Cas. Part. p. 451, *n.*

The objections to the cognizance by law of the claim of a partner, against a partner on partnership account, resolve themselves into this: The balance against every partner, on partnership account, is, like every other debt to the partnership, a part of the stock or property of the partnership; all this is first bound to the debts of the firm, and, after these are paid, it all belongs to the partners severally, in due proportion. No one, therefore, can make good his separate claim or title to one of these debts or balances, any more than he can to the separate debt of any creditor of the firm or a severed portion of the merchandise. There is, indeed, no separate claim until adjustment of all the claims; and therefore no ground for maintaining such a suit at law.

It may be said that there is, in fact, in each partner a kind of latent but vested interest in his share, and a proportionate claim against every partner who withholds his share; and that the process of account and adjustment gives no title, but only ascertains its extent and measure. Something like this is true; and equity proceeds on principles not very different. But the common law cannot, for the reason that it has no methods nor processes by which it could cause, or regulate, or recognize the account and adjustment necessary to define the personal claim of each partner. Certainly it cannot do this as easily and as completely as equity can do it; and this is substantially the reason why equity has jurisdiction over all cases of this kind. (*f*)

(*f*) "It is a general rule, that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law." Per Abbott, C. J., in Bovill *v.* Hammond, 6 B. & C. 149, 151. And in Rogers *v.* Rogers, 1 Hall, 391, it was expressly held, that a court of law cannot take jurisdiction of accounts between partners. See Harvey *v.* Crickett, 5 M. & S. 336, 340; Smith *v.* Barrow, 2 T. R. 476, 478; Nugent *v.* Locke, 4 Cal. 318; McKnight *v.* McCutchen, 27 Mo. 436. In De Tastet *v.* Shaw, 1 B. & Ald. 664, 669, Lord Ellenborough, C. J., delivering the opinion of the court, said: "The only mode in which a fact can be controverted in an action at law, namely, by taking an issue to be tried by a jury, is impracticable in the present case: because the debt constitutes an item in a partnership account; and the partnership account must be taken in order to ascertain how much was due at the execution of the deed, and whether the sum has been reduced in any and what degree by the intermediate gains of the partnership business. Such an account cannot be taken by a jury, and consequently no issue could be taken on the debt on which the defendants rely." "The short objection to this application is," said Chambre, J., "that the court cannot direct a partnership account to be taken, without assuming a jurisdiction that does not belong to it." Chapman *v.* Koops, 3 B. & P. 289; Parker *v.* Pistor, 3 B. & P. 288. See Judd *v.* Harris, 6 Vt. 185; Spear *v.* Newell, 13 Vt. 288; Beach *v.* Hotchkiss, 2 Conn. 425.

The action of account may be brought between partners wherever that action is in use; but it seems properly applicable only where the partnership has come to an end. 1 Story Eq. §§ 659–665.

The limits between legal and equitable jurisdiction in relation to questions arising under partnership are, on the whole, sufficiently well defined, although there are some questions upon which an unfortunate degree of obscurity still rests. We will, in the first place, consider those cases of which courts of law take cognizance, and then those which are referred to equity.

SECTION II.

QUESTIONS BETWEEN PARTNERS COGNIZABLE AT LAW.

§ 186. **Demands Distinct from Affairs of Partnership.** — Partners may sue their partners, or be sued by them, on any matter not connected with the partnership, as freely, and in precisely the same way, as if they were not partners; for the plain reason, that, outside of the partnership, they are not partners. So if one partner sells his separate property to his partner, this does not make it partnership property; and the seller may sue the buyer for the price, at law. (*ff*) Nor does it make any difference whether this personal and separate contract or debt becomes afterwards connected with the partnership, or is so at the time in the intention of the parties, if it be not on account of the partnership, so as to involve all the partners. Thus, if one partner, who has taken more than his proportion from the partnership, and therefore has a large debit against him on the partnership books, wishes to reduce this debit, and borrows money from another partner, confessedly to be paid to the partnership in reduction of this debit, the borrower is bound personally to the lender, and the lender can sue personally the borrower. And, if a partner sues a partner on any independent and several indebtedness, the defendant cannot set off or recoup any alleged balance which he claims that he should have against the plaintiff, on partnership account, when that account shall be hereafter settled and balanced. (*g*)

(*ff*) Elder *v.* Hood, 28 Ill. 538.

(*g*) Ives *v.* Miller, 19 Barb. 196. See Roberts *v.* Fitler, 13 Pa. 265; Molony *v.* Davis, 48 Pa. 512; [Wood *v.* Brush, 72 Cal. 224, 13 Pac. 627; Jones *v.* Shaw, 67 Mo. 667; McKay *v.* Overton, 65 Tex. 82; Tomlinson *v.* Nelson, 49 Wis. 679.] Though one partner give another his promissory note, if it be before and in aid of settlement, and may not be found to be due on settlement, no suit at law between the partners can be founded on it. Buell *v.* Cole, 54 Barb. 353. The neglect, however, of a defendant to enjoin a suit at law against him by a copartner, in respect to their partnership dealings, does not prevent his maintaining a bill for an account after judgment in the suit, and offsetting against it so much as upon settlement shall be found just. Gregg *v.* Brower, 67 Ill. 525.

§ 187. **Demands arising before Partnership launched.** — So, too, a partner can sue a partner on any contract or transaction arising before the partnership, although referring to the partnership. (*h*) Thus, if one proposed partner borrow money of another, to be advanced by the borrower as a part of his contribution to the stock of the partnership, the borrower is liable at law personally to the lender, whether the money so borrowed is so used and applied by the borrower or not. (*i*) [1]

(*h*) Goddard *v.* Hodges, 3 Tyrw. 209. Where the plaintiff contracted to do certain work for a joint-stock company for a given sum, and afterwards caused his name to be inserted in the books of the company as a holder of shares therein, — held, that this did not affect his right to sue the company in respect of the prior contract. Lucas *v.* Beach, 1 Scott N. R. 350, 1 M. & G. 417. See Holmes *v.* Higgins, 1 B. & C. 74 ; Fox *v.* Clifton, 6 Bing. 776 ; Howell *v.* Brodie, 6 Bing. N. C. 44 ; Cheny *v.* Clark, 3 Vt. 431 ; Currier *v.* Webster, 45 N. H. 226.

(*i*) Helme *v.* Smith, 7 Bing. 714, opinion of Parke, J. *Ex parte* Notley, 1 Mont. & A. 46 ; Elgie *v.* Webster, 5 M. & W. 518 ; Bumpass *v.* Webb, 1 Stewart, 19 ; Scott *v.* Campbell, 30 Ala. 728 ; Duncan *v.* Lyon, 3 Johns. Ch. 362 ; Bailey *v.* Starke, 6 Ark. 191 ; Biernan *v.* Brashes, 14 Mo. 24 ; French *v.* Styring, 2 C. B. N. S. 357 ; [Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808 ; Bates *v.* Lane, 62 Mich. 132, 28 N. W. 753.] See Collamer *v.* Foster, 26 Vt. 754 ; Pool *v.* Delancy, 11 Mo. 570 ; Currier *v.* Rowe, 46 N. H. 72.

The above cases show that if A., entering into partnership with B., at B.'s request advances for him the amount of capital B. has agreed to contribute to the joint funds, this is a loan of money by A. to B., and constitutes a debt, arising previous to the partnership, which A. may recover at law pending the partnership, and though the partnership accounts are unsettled. See also Williams *v.* Henshaw, 11 Pick. 84 ; Crater *v.* Binninger, 45 N. Y. 545. So one partner may sue another for money loaned to pay the latter's share of an execution against the firm. Chamberlain *v.* Walker, 10 Allen, 429. And if persons enter into partnership, and pay in their respective contributions, one of them cannot now recover back his share from the others, though the concern prove a losing one and is abandoned. The shares of all the partners are now only subject to an account. See opinion of Cockburn, C. J., in French *v.* Styring, *supra;* Nockels *v.* Crosby, 3 B. & C. 819, 824, opinions of Holroyd and Littledale, JJ. See also Gale *v.* Leckie, 2 Stark. 107 ; Townsend *v.* Goewey, 19 Wend. 424 ; Manning *v.* Wadsworth, 4 Md. 59 ; Rockwell *v.* Wilder, 4 Met. 561 ; Wright *v.* Michie, 6 Gratt. 354 ; Robinson *v.* McIntosh, 3 E. D. Smith, 221. It has been said, that it is not competent for partners to agree in their articles that such person as a majority of them shall afterwards appoint shall have the power to sue in his own name for moneys agreed to be contributed by each partner to the general fund. Fortune *v.* Brazier, 10 Ala. 791. But query. See *post*, § 191, and note (*u*).

[1] Where A. buys one-half of B.'s stock in trade and enters into a partnership with him in the business, the purchase of the goods is not a partnership matter, and B. may sue at law for the purchase-money. Kinney *v.* Robison, 49 Mich. 247, 18 N. W. 120. Or if B. fails to keep his agreement as to the sale, A. may sue at law for breach of the contract of sale. Reid *v.* McQuesten, 61 N. H. 421. The purchase-money goes of course to B. individually, not to the new partnership. Ball *v.* Farley, 81 Ala. 288, 1 So. 253.

§ 188. **Demands arising after Termination of Partnership.** — So, too, if the contract or transaction arise after the termination of the partnership, although it have a reference to it, an action at law is still maintainable. (*j*) Thus, if there were three partners, and the partnership is dissolved by consent, and there is a charge against one of them for a thousand dollars, and he borrows money from another partner to pay it, and does so pay it, the lender can sue the borrower, although the accounts are unsettled, and it is uncertain where the final balance will lie or what it will be. (*k*) But if, in such a case, the accounts are all adjusted and balanced, and it is certain that the lender owes the borrower, as partner, on

(*j*) Causes subsequent to dissolution, from which a right of action between partners may arise, may be such as originate solely in the relations of partners to third persons. Osborne *v.* Harper, 5 East, 225; Wright *v.* Hunter, 1 East, 20, 5 Ves. 792. See Butcher *v.* Forman, 6 Hill, 583. See Wright *v.* Cumpsty, 41 Pa. 102, where the plaintiff and defendant dissolved partnership, but, before the formal and public dissolution, the defendant contracted large debts in the name of the old firm, which the plaintiff paid. It was held that the plaintiff might recover the amount in an action against the defendant as money paid to his use. Hutton *v.* Eyre, 6 Taunt. 289, 1 Marsh. 603. But if there are more than two partners, and if, after dissolution, by the misconduct of one, the rest are compelled to pay money to third parties, it is important to ascertain whether such payment is made out of a joint fund, or by the several contributions of each; for, after dissolution, there is generally no joint stock or fund, and if such payment is made by an aggregate of the several funds of the contributing partners, then each contributor must bring a separate action for the amount of his advance, because, *quoad* that payment the contributors are not partners. See Osborne *v.* Harper, *supra;* Graham *v.* Robertson, 2 T. R. 282; Brand *v.* Boulcott, 3 B. & P. 235; Kelby *v.* Steel, 5 Esp. 194; Manahan *v.* Gibbons, 19 Johns. 109, 112, 426; Doremus *v.* Selden, 19 Johns. 213.

Of the foregoing cases, it is to be observed, that the parties were not partners at the time of action brought; that the cause of action accrued subsequently to dissolution; and that the subject-matter of the suit was in no way connected with the partnership nor with the partnership accounts. See Milburn *v.* Codd, 7 B. & C. 419. Though the plaintiff and defendants had ceased to be partners, and the cause of action had accrued after their dissolution, yet the subject-matter of the suit was deemed to be properly an item of the unsettled partnership accounts, and the plaintiff's action, therefore, not maintainable. See De Jarnette *v.* McQueen, 31 Ala. 230.

(*k*) A. & B. dissolved partnership, and A. assumed the possession and entire control of the partnership stock in trade. In disposing of the goods, he sold a part of them to B., who signed a bill of sale, acknowledging the purchase of A. It was held that A. might recover the value of the goods in an action at law against C. Caswell *v.* Cooper, 18 Ill. 532. The plaintiff and three other persons entered into partnership for a single adventure, the plaintiff furnishing all the capital. The defendant was one of the four partners, and the adventure being closed, and the firm dissolved, the capital was deposited with the defendant for the plaintiff. It was held that it thereby became the individual property of the plaintiff, and could be recovered by him of the defendant. Myers *v.* Winn, 16 Ill. 135. See Warbritton *v.* Cameron, 10 Ind. 302; Rockwell *v.* Wilder, 4 Met. 562; Roache *v.* Pendergrast, 3 H. & J. 33; Chamberlain *v.* Walker, 10 Allen, 429. See Wycoff *v.* Purnell, 10 Iowa, 332.

this final balance, what he thus owes might be applied by way of set-off to the lender's action. But not unless the accounts are settled. (*l*) [1]

§ 189. **Private Debt.** — If the parties to a debt or contract can be considered in reference to it as only joint sureties or joint contractors, (*m*) or connected in any other way than as partners, (*n*) the disability of partnership does not apply, although they may be partners generally. (*o*)

(*l*) Ives *v.* Miller, 19 Barb. 196. See Pool *v.* Delaney, 11 Mo. 570; Scott *v.* Campbell, 30 Ala. 728; Coleman *v.* Coleman, 12 Rich. L. (S. C.) 183; [Greathouse *v.* Greathouse, 60 Tex. 597.]

(*m*) Burnell *v.* Minot, 4 J. B. Moore, 340; Helme *v.* Smith, 7 Bing. 709, 713, 714; Holmes *v.* Williamson, 6 M. & S. 158; Ansell *v.* Waterhouse, 6 M. & S. 390, per Bayley, J.; Blackett *v.* Weir, 5 B. & C. 385, 388; Batard *v.* Hawes, 2 E. & B. 287.

(*n*) If a person is only a nominal partner, but, from being held out as a partner to third persons, is obliged to pay the debts of the firm, he may, in an action against the actual partner, show the true nature of his relations to the firm, and recover the whole amount he has been compelled to pay. Latham *v.* Kenniston, 13 N. H. 213. In like manner, if persons share in profits in such a way that they are partners *quoad* third persons, but yet are not partners *inter se*, there is nothing to prevent an action being maintained by either against the other. Hesketh *v.* Blanchard, 4 East, 144.

As to a distinction between a general and a special partnership, see Galbraith *v.* Moore, 2 Watts, 86. See Brigham *v.* Eveleth, 9 Mass. 538; Jones *v.* Harraden, 9 Mass. 540; Gow on Part. [79], citing Abbott *v.* Smith, 2 W. Bl. 947; per Lord Kenyon, Merryweather *v.* Nixon, 8 T. R. 816; Graham *v.* Robertson, 2 T. R. 282; Herries *v.* Jameson, 5 T. R. 556; Evans *v.* Yeatherd, 2 Bing. 133; Wilson *v.* Cutting, 4 Moore & S. 268; Noel *v.* Bowman, 2 Litt. 46; Wright *v.* Hunter, 5 Ves. 792.

(*o*) As where four persons, who had acted as directors of a proposed railway

[1] Where upon dissolution or otherwise one partner agrees with the other to assume certain firm debts, and fails to pay them, the copartner, upon being obliged to pay the debt, may maintain an action at law for the amount; for the debt has ceased to be due from the partnership. The copartner has assumed the position of a mere surety, and the contract by which this has been done is a matter entirely apart from the partnership. Kellogg *v.* Moore, 97 Ill. 282; Warring *v.* Hill, 89 Ind. 497; *In re* Burgess, 83 Me. 339, 22 Atl. 222; Graham *v.* Thornton, (Miss.) 9 So. 292; Neil *v.* Greenleaf, 26 Oh. St. 567; Miller *v.* Bailey, 19 Ore. 539, 25 Pac. 27; Scott's Appeal, 88 Pa. 173; Clarke's Appeal, 107 Pa. 436; Edwards *v.* Remington, 51 Wis. 336, 8 N. W. 193; Jewell *v.* Ketchum, 63 Wis. 628, 23 N. W. 709; Webster *v.* Lawson, 73 Wis. 561, 41 N. W. 710. But no action will lie without showing either a particular time set for payment, or the lapse of a reasonable time. Geise *v.* Ragan, 80 Ga. 732, 6 S. E. 697. If the agreement takes the form of a covenant to pay debts, and is broken, the copartner may of course sue even if he has not paid the debt himself. Miller *v.* Bailey, 19 Ore. 539, 25 Pac. 27. This would most frequently happen if a time was limited for payment.

Where upon dissolution one partner agrees to pay the debts of the firm, his copartner, who has previously supplied goods to the firm, may sue at law for the price of them. Thropp *v.* Richardson, 132 Pa. 399, 19 Atl. 218. Where upon dissolution one partner agreed to collect the firm debts and pay over half of what he collected to his copartner, the latter may maintain an action at law on the agreement. Ferguson *v.* Baker, 116 N. Y. 257, 22 N. E. 400.

§ 190. **Separation by Agreement from Partnership Business.** — It is quite clear that certain particular and distinct transactions may be separated from the affairs or business of the partnership, by the agreement of the parties. (*p*)[1] Then those persons who are concerned in this separated matter are not as partners to each other, although in all other business relations they remain partners. And it may be added, the law will take cognizance of any such separated transaction, and of any single one of which the character or circumstances are such as to indicate that the meaning of it is, that one partner shall pay a certain sum of money to another partner before any account is taken; which money is not to be carried into the general account when that is taken. (*q*)

On similar grounds, a partner can sue a partner on his note or indorsement or acceptance. (*r*) Nor do we think it would

company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them on their personal responsibility, it was held that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution. Tindal, C. J.: "If these four persons entered into the contract with the attorneys, distinct from their character of members of the company, it appears to me that the case does not fall within the general rule." Edger *v.* Knapp, 6 Scott N. R. 707, 712; Boulter *v.* Peplow, 9 C. B. 493; Sedgwick *v.* Daniell, 2 H. & N. 319.

(*p*) Coffee *v.* Brian, 10 J. B. Moore, 341, 3 Bing. 54; Cross *v.* Cheshire, 6 Exch. 43. See Cousten *v.* Burke, 2 Harris & G. 300, 303; Collamer *v.* Foster, 26 Vt. 754; Williams *v.* Henshaw, 11 Pick. 83, 84; Gibson *v.* Moore, 6 N. H. 547; Caswell *v.* Cooper, 18 Ill. 532; Buckner *v.* Ries, 34 Mo. 357. [Dakin *v.* Graves, 48 N. H. 45.] The *nisi prius* case of Robson *v.* Curtis, 1 Stark. 78, seems hardly reconcilable with the principle of the foregoing decisions.

(*q*) See the language of Bayley, J., in Jackson *v.* Stopherd, 2 Cr. & M. 361, 4 Tyrw. 330; and see Finlay *v.* Stewart, 56 Pa. 183.

(*r*) Preston *v.* Strutton, 1 Anst. 50; Neale *v.* Turton, 4 Bing. 151; Bonaffe *v.* Fenner, 6 Sm. & M. 212; Grigsby *v.* Nance, 3 Ala. 347; Morrison *v.* Stockwell, 9 Dana, 172; Lomas *v.* Bradshaw, 9 C. B. 620. See Teague *v.* Hubbard, 8 B. & C. 345; Case *v.* Maxey, 6 Cal. 276. [McSherry *v.* Brooks, 46 Md. 103; McKay *v.* Overton, 65 Tex. 82.] And where it is ascertained by two partners who are about closing their concerns, that a balance will certainly be due by one of them to the other on a final settlement, although the true balance cannot at the time be ascertained, then if such debtor partner gives his note to the creditor partner for a sum within the balance which it is acknowledged will be due to him on the final settlement, such note is given upon a good consideration, and is equivalent to an express promise to pay the given sum mentioned; and the payment of such note may be enforced at law, though the balance is not struck between them. Rockwell *v.* Wilder, 4 Met. 556. See Ives *v.* Miller, 19 Barb. 196; Pool *v.* Delaney, 11 Mo. 570. See Grid-

[1] As where one partner assents to the other taking partnership property to his individual use, in consideration of an agreement to pay half its value to the partner individually. Purvines *v.* Champion, 67 Ill. 459; Neil *v.* Greenleaf, 26 Oh. St. 567. So if one partner agrees to pay a copartner a share of his profits, the latter may maintain an action at law upon breach of the agreement. Emery *v.* Wilson, 79 N. Y. 78.

be competent for the defendant to defeat such an action by showing that it was in fact, on partnership account, or a partnership debt, because this would vary by evidence a written contract. (*s*)

So, too, if a partner receives a sum of money actually belonging to his partner, but carries the same to partnership account, the partner to whom the money belongs may, nevertheless, sue the partner who received it. (*t*) And, in general, the mere fact that a transaction is entered upon partnership books or accounts as belonging to the partnership will not prevent a suit by the partner to whom it actually belongs; as only the fact of, and not the appearance of, partnership interest could defeat his suit.

If there be a firm of more than two persons, and, on settlement, one is found to have withdrawn more than his share, the other two may have a joint action against him thereon; but neither one of the other two can sue separately, although he has an assignment of all the rights and interests of his associates in the assets of the firm. (*tt*)

ley *v.* Dole, 4 N. Y. 486. In Van Ness *v.* Forrest, 8 Cranch, 30, it was held, that a promissory note, given by one partner to another for the use of the copartnership, will sustain an action in the name of the promisee against the maker, notwithstanding the connection, and that the money, when recovered, would belong to the copartnership.

(*s*) It should be remembered, with respect to negotiable paper, that credit is deemed to be given exclusively to those whose names appear on the face of the paper, and that it is not allowable to add parties by parol. See 1 Pars. on Notes & Bills, pp. *93, *102. But, to an action on a note given by an outgoing partner for assets, he may set up in defence an agreement, that, for any notes or accounts that should prove worthless, he should be allowed a deduction *pro tanto*. Bethel *v.* Franklin, 57 Mo. 466.

(*t*) The plaintiff, and Robert Smith, his father, had been in partnership, during which time one Keate became indebted to them in 531*l*. Robert Smith died, leaving plaintiff his sole executor. Subsequently, the plaintiff took the defendant into partnership, and Keate became indebted to these two in the further sum of 30*l*. He afterwards became involved, and his effects were assigned to trustees, for the benefit of his creditors. Two payments were made in the course of distribution at different times. The first, which was made to the plaintiff and defendant, was divided between them according to their several proportions; that is, the proportion of the former debt of 531*l*. to the plaintiff's separate use, and the proportion of the 30*l*. in moieties between them. After this, the trustees transmitted a bill of exchange to the plaintiff and defendant in their joint names, and the defendant alone received the money under the title of Smith & Barrow. The plaintiff's proportion of this second dividend, so far as related to his original debt, was 79*l*. 14*s*. 6*d*. The question was, whether the plaintiff could recover this sum from the defendant, in an action for money had and received to the plaintiff's use, it being contended for the defendant that it was money received on account of a partnership transaction, and therefore not recoverable in the present action. It was held that he could maintain this action. Smith *v.* Barrow, 2 T. R. 476. See Coffee *v.* Brian, 10 J. B. Moore, 341, 3 Bing. 4; *ante*, note (p). Cross *v.* Cheshire, 7 Exch. 43.

(*tt*) Wiggin *v.* Cummings, 8 Allen, 353.

§ 191. **Action on Partnership Agreement.** — If the articles of partnership, or other agreements between the partners, are under seal, covenant will lie for any breach of the agreement to enter into partnership, or of any stipulation for payment, advances, or other acts for setting the partnership into operation, although accounts between the partners which are subsequent to the partnership require to be investigated and adjusted in a court of equity.(*u*)

(*u*) Venning *v.* Leckie, 13 East, 7 ; *Ex parte* Notley, 1 Mont. & A. 46 ; Glover *v.* Tuck, 24 Wend. 153 ; Terrill *v.* Richards, 1 Nott & McC. 20 ; Williams *v.* Henshaw, 11 Pick. 81 ; Ellison *v.* Chapman, 7 Blackf. 224 ; Bailey *v.* Starke, 6 Ark. 191. In like manner, covenant will lie, subject to the qualification stated in the text, for the breach of any of the stipulations in the articles of partnership after the partnership has actually begun. Glover *v.* Tuck, *supra ;* Want *v.* Reese, 1 Bing. 18 ; Hatcher *v.* Seaton, 2 M. & W. 47; Bedford *v.* Brutton, 1 Scott, 261, 262 ; M'Arthur *v.* Ladd, 5 Ohio, 514, 521 ; Duncan *v.* Lyon, 3 Johns. Ch. 351, 362 ; Hayes *v.* Flowers, 25 Miss. 168 ; Ridgway *v.* Grant, 17 Ill. 117 ; Manning *v.* Wadsworth, 4 Md. 70 ; Hall *v.* Stewart, 12 Pa. 213 ; Capen *v.* Barrows, 1 Gray, 376. But covenant does not lie, on an agreement of partnership, to compel the payment of a balance due to the partnership from one of the partners. Niven *v.* Spickerman, 12 Johns. 401. An action will lie between partners for the breach of a covenant to account. And in the simple case of a single, or at most but temporary, breach of partnership covenants, unless the bill pray for, and there are just grounds for, dissolution, equity will not interfere by injunction or otherwise ; but will leave the injured party to his action of covenant, as the more appropriate remedy. Marshall *v.* Colman, 2 Jac. & W. 266.

Each partner, committing a breach of his covenant, may be sued by all the rest jointly for the joint damage sustained by them in respect thereof : for the covenant of each covenantor is, in contemplation of law, made with all the rest, excluding himself, and all the rest are joint as against him ; "for if there be twenty partners, and one of them covenants with all the rest, he is, in that respect, several from them all, and they all joint against him." *Per curiam* in Thimblethorpe *v.* Hardesty, 7 Mod. 117 ; Vesey *v.* Mantell, 9 M. & W. 323 ; Eccleston *v.* Clipsham, 1 Saund. 153 ; Wright *v.* Michie, 6 Gratt. 354, 358 ; Spencer *v.* Durant, Comb. 115 ; Saunders *v.* Johnson, Skin. 401 ; Capen *v.* Barrows, 1 Gray, 376. It was held in one Massachusetts case, on the supposed authority of an English decision, that where three or more copartners have contributed severally and in different proportions to the joint stock, and one of them withdraws from the copartnership, in violation of their mutual agreement, each has his several remedy for a breach. Dunham *v.* Gillis, 8 Mass. 462. See Thomas *v.* Pyke, 4 Bibb, 418. But Dunham *v.* Gillis has been overruled, and the authority of the case upon which it was decided strongly questioned, in Capen *v.* Barrows, *supra,* by Metcalf, J., in delivering the opinion of the court. Though partners covenant, each respectively with the others, and with their respective executors, administrators, &c., upon the death of one of the partners, a covenantee, his right of action survives to his co-covenantees. Eccleston *v.* Clipsham, 1 Saund. 153.

As in actions of covenant between partners, so in actions upon simple contracts, each partner is regarded as contracting with the rest, excluding himself, and may be sued by all the rest jointly for the violation of his contract ; he being several from them all in respect of the breach, and they all joint against him. Venning *v.* Leckie, 13 East, 7.

Though partners cannot, by agreement among themselves, give an authority to any one of them to bring an action in his name against persons not members of the firm, there is no objection to their empow-

Whenever there has been any breach of an express stipulation between persons who are partners, an action for damages will be sustainable, unless the breach, or the stipulation itself, or both, are such that they involve the whole partnership business and accounts, and the damages can be determined only by first settling those accounts. (*v*) Thus, if one partner agrees to pay another a certain salary, or commission, or other compensation for his services over and above his share of the profits, and independently of them, it would seem that an action at law can be maintained on this promise. (*w*) And the same rule would probably apply to the breach of any distinct and independent agreement in the articles of partnership, unless the difficulty of

ering one of their number to be the sole plaintiff in actions to be brought *inter se* in the course of the partnership business. "Such an agreement is, in effect, an undertaking not to object on account of all who ought otherwise to have joined in the action not being joined." Per Best, C. J., in Radenhurst *v.* Bates, 3 Bing. 463, 470; Cross *v.* Jackson, 5 Hill, 478. In this last case, the property and interest of a large association were, by their articles, vested in trustees thereafter to be elected, and the subscribers agreed to pay to such trustees their respective subscriptions. Cowen, J., said: "The effect was, on the trustees being elected, as provided by the articles, to vest every legal right of the company in them, the right to sue the defendant in their own names inclusive. Had it been left for the law to imply a promise, it would, no doubt, have looked to the other stock subscribers as the promisees, because the consideration came from them; and, in that case, the action must have been in the names of the whole." Niven *v.* Spickerman, 12 Johns. 401. See Davies *v.* Hawkins, 3 Moore & S. 488. See also Fortune *v.* Brazier, 10 Ala. 791, for a case hardly reconcilable with the above authorities; Brown *v.* Tapscott, 6 M. & W. 119.

(*v*) Capen *v.* Barrows, 1 Gray, 376. See Bedford *v.* Brutton, 1 Bing. N. C. 407. See Andrews *v.* Ellison, 6 J. B. Moore, 199; and compare Bedford *v.* Brutton, *supra*, with Estes *v.* Whipple, 12 Vt. 373. See also Ridgway *v.* Grant, 17 Ill. 117. [Hunt *v.* Reilly, 50 Tex. 99.]

(*w*) Paine *v.* Thacher, 25 Wend. 450. In Weaver *v.* Upton, 7 Ired. 458, the action was covenant, and the breach assigned the non-payment of $450 by the defendant to the plaintiff. The covenant was contained in articles of copartnership between Upton & Weaver, and was as follows: "The said Upton, of the first part, bargains and agrees to give me, the said Weaver of the second part, four hundred and fifty dollars, to manage the business, which I agree to manage according to the best of my judgment." In this action, the defendant's counsel moved to nonsuit the plaintiff, upon the ground that the covenant amounted to an article of copartnership, and that the $450, for the non-payment of which the covenant was alleged to have been broken, was to be allowed out of the funds of the copartnership. A nonsuit was accordingly entered, and upon appeal the judgment was affirmed. The court said: "The parties were stipulating concerning the partnership business, and the terms on which it was to be carried on; and, among others, that Upton bargained and agreed to let Weaver have $450 for his services that year. It seems to us that it would be against justice and right to construe the covenant to be an agreement by Upton, that he would pay that sum out of his own pocket. We think that it was an item in the expense account of the firm, and that the firm should pay it." The case of Hills *v.* Bailey, 27 Vt. 548 is quite similar. When partners agree to put into the firm a specified amount, each may sue the other for a breach of the agreement. Truitt *v.* Baird, 12 Kas. 420.

determining the damages without a general settlement should make the action nugatory, and be sufficient to defeat it.[1]

§ 192. **Inability of Partner to Sue another not therefore Absolute.** — The common law formerly allowed to a partner scarcely any remedy whatever against a partner. It seemed to say that partners have agreed to trust each other, and waive all legal rights. Malynes expressly declares that, "partners cannot sue each other by the law. If two men have a wood jointly, and the one selleth the wood and keepeth the money all to himself, in this case his fellow shall have no remedy against him by the common law; for as they, when they took the wood jointly, put each other in trust, and were contented to occupy and deal together, so the law suffereth them to order the profits thereof." (*x*) But the law, in these days, would not suffer the one to do so great a wrong to the other. We have already seen, and shall again see, that the law sustains actions, and gives remedies, between partners, unless more substantial and sufficient reasons than the mere theory, or rather fancy, stated by Malynes, interferes to prevent the law from doing justice.

If a partner gives his copartner a sum of money for a specific purpose, and the copartner keeps the money, there is authority and reason for holding that the partner who gave the money may sue him who received and holds it. (*y*) So a partner may sue his partner on a matter separated by an award. (*yy*)

§ 193. **Demand founded upon Balance of Account.** — There are no cases in which an action at law by partner against partner is maintained, so numerous or diversified as those which are founded

(*x*) Malynes, Lex Merc. 310.

(*y*) See Sharp *v.* Warren, 6 Price, 131, where the auditor of a benefit club, himself a member, having misapplied the funds of the society and refused to pay them over, it was held, that the proper officers of the club, suing in its name, might maintain *indebitatus assumpsit* against him for the amount, on the ground that the defendant's carrying away the money, and leaving the society, made him liable to them, as if he were not himself a member of the society, and that he had placed himself out of the protection of his situation in the society by his conduct in withdrawing. See Smith *v.* Barrow, 2 T. R. 476; Cross *v.* Cheshire, 6 Exch. 43.

(*yy*) One partner may sue another on an award upon a partnership matter in dispute between them, other partnership matters being still unsettled. Blakeley *v.* Graham, 111 Mass. 8.

[1] When an agreement for a partnership is entered into, but one party refuses to carry it out by entering into the business, the other party has an immediate right of action against him for a breach of contract. Goldsmith *v.* Sachs, 17 F. R. 726, 8 Sawy. 110; Powell *v.* Maguire, 43 Cal. 11; Mann *v.* Bowen, 85 Ga. 616, 11 S. E. 862; Vance *v.* Blair, 18 Ohio, 532; Hill *v.* Palmer, 56 Wis. 123, 14 N. W. 20. The same is true of an agreement fixing the term of the partnership. Terry *v.* Carter, 25 Miss. 168; Bagley *v.* Smith, 10 N. Y. 489; Addams *v.* Tutton, 39 Pa. 447.

upon the striking of a balance. There is much conflict and uncertainty among them, most of which, we think, might have been avoided by a distinct recollection of the reasons and principles obviously applicable to such cases.

The general rule is, that a partner may sue at law a partner on a promise to pay a balance which has been struck and agreed upon. (z) The reason for this is clear and certain; it is, that all the reasons for refusing this remedy at law disappear from such a case. For, in the first place, as to a settled balance, they are no longer partners. If the settlement has closed their concerns, or has followed the dissolution of the partnership, they are no longer partners at all; if the partnership goes on, they are not partners as to this balance, because it has been taken out of the current accounts, separated from the partnership, and appropriated to the partner to whom it is due. In the next place, there is no longer any objection on the ground that the law cannot take an account of the partnership debts and means, and take into view all those facts and considerations which are necessary in order to ascertain who owes the other, and how much. The law cannot do it, and equity will not do it; for it has been done already by the parties themselves. As there is now no reason for a court to do it, the inability of a court to do it constitutes no reason for refusing cognizance of the case.

§ 194. **Whether Final Balance Required.** — We apprehend the true rule to be, that courts of law should sustain any action between partners of the character above described. But the question is sometimes decided on more technical grounds. Sometimes it is said that no such action will be maintained, unless for

(z) And, as we have already seen, an action may be maintained upon such a promise, notwithstanding a covenant to account between the parties. Moravia *v.* Levy, 2 T. R. 483, note. See, in illustration of the general principle enunciated in the text, Preston *v.* Stratton, 1 Anst. 50; Brierly *v.* Cripps, 7 C. & P. 709; Wray *v.* Milestone, 5 M. & W. 21; Henley *v.* Soper, 8 B. & C. 16; Winter *v.* White, 1 Br. & B. 350; Ozeas *v.* Johnson, 1 Binn. 191, 4 Dall. 434; Walker *v.* Long, 2 P. A. Browne, 125; Young *v.* Brick, 2 Penning, 663; Beach *v.* Hotchkiss, 2 Conn. 425; Lamalere *v.* Caze, 1 Wash. C. C. 435; Wetmore *v.* Baker, 9 Johns. 307; Murray *v.* Bogert, 14 Johns. 318; Clark *v.* Dibble, 16 Wend. 601; Attwater *v.* Fowler, 1 Hall, 180; Calvert *v.* Marlow, 6 Ala. 342; Gulick *v.* Gulick, 2 Green (14 N. J.), 578; McColl *v.* Oliver, 1 Stew. 510; Fanning *v.* Chadwick, 3 Pick. 420; Van Amringe *v.* Ellmaker, 4 Barr, 281. So, if it is agreed between a surviving partner, and the representative of one deceased, that the former will pay the latter a certain sum of money in consideration of all interest in the partnership account being relinquished, an action of assumpsit to recover the sum agreed upon may be maintained. Wells *v.* Wells, Ventr. 40. [Cochrane *v.* Allen, 58 N. H. 250.] See Lane *v.* Tyler, 49 Me. 108; Holyoke *v.* Mayo, 50 Me. 385; Nims *v.* Bigelow, 44 N. H. 376; Goble *v.* Howard, 12 Ohio, 165; Wright *v.* Cumpsty, 41 Pa. 102.

a *final* balance. And this was asserted somewhat *obiter* perhaps, in Massachusetts, at a time when the equity powers of the Supreme Court of that State were not so extensive as they now are; and it was added, that all the different States concur in this. But after remarking that in some of our States, and in England, no suit at law, even for a final balance, can be maintained, unless upon an express promise to pay this balance, the court go on to say that, in Massachusetts, this is unnecessary; and the suit will be maintained although the accounts are not closed between the partners, and there exist outstanding debts; provided these debts are valueless, or the plaintiff tenders them to the defendant before the action.(*a*)

It would seem, therefore, that the phrase "final balance" is not used in a very strict sense, although, in another part of the same decision, the court ask, "Is the account a final balance, and will the payment in this suit be an absolute termination of all the partnership accounts between these parties?" (*b*) the last clause of this sentence being in the nature of a definition of a final balance.

It is certain, as our notes show, that there are high authorities which recognize a rule requiring that the balance should be final, meaning that the accounts should be closed and this balance be the result, and that there should be also an express

(*a*) Williams *v.* Henshaw, 11 Pick. 81, 82.

(*b*) In Williams *v.* Henshaw, 12 Pick. 378, the question, as stated by the court was, "whether one partner, after the expiration of the joint concern, or even after dissolution, can, at any time, without any settlement, without any agreement with or notice to his copartner, by *assuming* all the outstanding debts, maintain assumpsit against him for any balance which may be due." The court held that he could not; and for the reason, that, notwithstanding a judgment for the plaintiff on a balance thus made out, "in many ways new balances might arise, which would give rise to new actions, and thus create a multiplicity of suits." See Brinley *v.* Kupfer, 6 Pick. 179; Sikes *v.* Work, 6 Gray, 433. In Wilby *v.* Phinney, 15 Mass. 116, the expression "final balance" seems to be used with great latitude. See Fanning *v.* Chadwick, 3 Pick. 420, 423; Rockwell *v.* Wilder, 4 Met. 561. See also Haskell *v.* Adams, 7 Pick. 59; Capen *v.* Barrows, 1 Gray, 376, 382. In Haskell *v.* Adams, several members of a company gave its agent their note, which was discounted, and money raised for the use of the company. The company being dissolved, the partners who gave the note brought assumpsit against another partner to recover the proportion of the amount of the note due from him. The company was still in debt, and no adjustment of their affairs had been made. It was held that the action could not be maintained.

It may be inferred from all the above cases that the balance which is treated as final is one occurring upon the dissolution of the firm. And in Dickinson *v.* Granger, 18 Pick. 317, the court say expressly: "A final balance of course can never arise till after a dissolution." Before one partner can sue another at law, there must be a dissolution, a final settlement, a balance struck, and a promise to pay. Balances struck preparatory to a settlement will not support an action. Burns *v.* Nottingham, 60 Ill. 561.

promise to pay this balance. (*c*) But this is going further than the weight of authority, and much further, we think, than the reason of the case extends. The later English authorities appear to have established the rule in that country, that an express promise is not necessary, because a promise is implied in closing the accounts and stating the balance. (*d*)

(*c*) That there must be an express promise to pay a balance seems to have been held by Buller, J., in Moravia *v.* Levy, 2 T. R. 483, note; though in Foster *v.* Allanson, 2 T. R. 479, the same judge said that he had no difficulty in holding that the dissolution of a previously existing partnership and the settlement of an account were, in point of law, "a sufficient consideration for a promise;" which remark seems as applicable to an implied as to an express promise. But in Fromont *v.* Coupland, 2 Bing. 170, it was distinctly intimated by the court, mainly upon the authority of the cases just cited, and contrary to the *nisi prius* case of Rackstraw *v.* Imber, Holt N. P. 368, that there must be an express promise. It is to be observed, however, that the court also held, that no balance had been struck between the parties, and that the case was decided, partly at least, on that ground. In this country, Fromont *v.* Coupland, and Moravia *v.* Levy, have been followed in quite a number of the States. Thus, in New York, one partner cannot recover a balance of accounts, except there be an express promise to pay it. Casey *v.* Brush, 2 Caines, 293; Halsted *v.* Schmelzel, 17 Johns. 80; Westerlo *v.* Evertson, 1 Wend. 532; Townsend *v.* Goewey, 19 Wend. 424; Pattison *v.* Blanchard, 6 Barb. 537. So in South Carolina: Course *v.* Prince, 1 Mill C. R. 416. In Illinois: Davenport *v.* Gear, 3 Ill. 495; Frink *v.* Ryan, 4 Ill. 322; Chadsey *v.* Harris, 11 Ill. 151; Blue *v.* Leathers, 15 Ill. 32. And see Wycoff *v.* Purnell, 10 Iowa, 332. In Pennsylvania, the early cases seem to hold, that the promise upon which one partner may recover from another a balance of accounts need not be express. Ozeas *v.* Johnson, 1 Binn. 191, 4 Dall. 434; Lamalere *v.* Caze, 1 Wash. C. C. 435; Hourguebie *v.* Girard, 2 Wash. C. C. 212; Williams *v.* Henshaw, 11 Pick. 81. But in Killam *v.* Preston, 4 W. & S. 14, the court seemed inclined to hold, apparently upon the authority of the earlier English cases, that the promise must be express. But this was not directly ruled. And in Van Amringe *v.* Ellmaker, 4 Barr, 281, the court held, that, conceding the principle that assumpsit will not lie by one partner to recover from the other a balance due upon the settlements of the partnership accounts, without proof of an express promise to pay, yet the execution of a note for the balance due after settlement was a sufficient express promise. See Brown *v.* Agnew, 6 W. & S. 235; Hamilton *v.* Hamilton, 18 Pa. 20. Whether an express promise is requisite in New Jersey and in North Carolina, see Jaques *v.* Hulit, 1 Harrison (16 N. J.) 38; Gulick *v.* Gulick, 2 Green (14 N. J.) 578; Graham *v.* Holt, 3 Ired. 300.

(*d*) Rackstraw *v.* Imber, Holt N. P. 368. The plaintiff and defendant, having dissolved partnership, met to adjust their accounts. The defendant admitted a certain balance to be due from him to the plaintiff, and offered to pay it, if the plaintiff would sign a certain deed. The plaintiff refused to sign the deed, and brought the present action for the admitted balance. It was held that he was entitled to recover. See Henley *v.* Soper, 8 B. & C. 16, 21. In Wray *v.* Milestone, 5 M. & W. 21, the plaintiff and defendant, beside having other general dealings, had also been partners in a particular adventure for the purchase and sale of wool. They came to a general account, of which a debit against the defendant for loss on wool formed one item. The defendant signed the account, and admitted the balance due. The present action was brought to recover the amount of the item entered in the account as the "loss on wool." Upon motion for a new trial, one of the questions was, whether a sufficient promise by the defendant was proved. Lord Abinger, C. B.:

The act of settling the account and striking the balance is itself the plainest acknowledgment of an indebtedness which is wholly liberated from all complication with the accounts of the partnership: it grows out of them, but only out of their termination and settlement. Nor can we doubt that this rule of law must prevail in this country also. (*e*)

Then, as to the question whether the balance must be a final one, we cannot but think that it is quite enough if it be a balance, or a debt, distinctly separated from the partnership accounts, either by their entire settlement, or by a settlement which may be partial as to the affairs of the partnership, but complete as to this debt. If not absolutely final, perhaps a presumption will always exist that it remains connected with partnership affairs. But, as it is perfectly well settled that a partner may sue his copartner on a cause of action which never pertained to the partnership, it seems quite as certain that he should have his action for a cause which he can show to have been cut out from the partnership by himself and his partners jointly, and to be as completely separated from it as if there had never been any connection between them.

It is undoubtedly necessary that all the partners should be bound by the settlement, or by the agreement by which this matter was separated from the partnership. (*f*) In few words, we think it

"The account being settled, there is an unqualified acknowledgment, signed by the defendant, that 15*l.* is due from him to the plaintiff on the general balance of accounts between them." . . . "If the item forms part of a settled account, with a promise to pay the balance, I think there is no need of an express promise to pay the particular item." Parke, B.: "There is no occasion to go through the form of words that he promises: the transaction speaks for itself." Maule, B.. "I know of no rule of law which requires in this, or in any other case, an express promise." In Jackson *v.* Stopherd, 2 Cr. & M. 361, to which we have already referred, two persons who had worked a coal-mine having dissolved partnership, and made an agreement for the division of a certain portion of their property, the nature of their bargain for the division and the subsequent actual use by one partner of the whole property, was held to raise an implied obligation on him to pay the other partner for a moiety of it. Cross *v.* Cheshire, 7 Exch. 43. In this case, a promise by the defendant to pay the plaintiff, his partner, the sum sued for, was implied from the defendant's admission, that, through his own improper use of the partnership name, the plaintiff had been compelled to expend that sum for the defendant's sole benefit.

(*e*) In Massachusetts, an action by one partner against another to recover a balance of accounts, may be sustained upon an implied promise. Williams *v.* Henshaw, 11 Pick. 79; Wilby *v.* Phinney, 15 Mass. 116, 121; Brigham *v.* Eveleth, 9 Mass. 538; Fanning *v.* Chadwick. 3 Pick. 420; Dickinson *v.* Granger, 18 Pick. 317. So also in Alabama, M'Coll *v.* Oliver, 1 Stew. 510; Pope *v.* Randolph, 13 Ala. 214: and in Vermont, Spear *v.* Newell, 13 Vt. 288.

(*f*) See Gill *v.* Kuhn, 6 S. & R. 333; Course *v.* Prince, 1 Mill C. R. 416; Bovill *v.* Hammond, 6 B. & C. 149, 151, per Littledale, J.; Carr *v.* Smith, 5 Q. B. 128; Chadsey *v.* Harris, 11 Ill. 151; Morrow *v.* Riley, 15 Ala. 710. One partner may impliedly assent to and be bound by an

not necessary that the balance should be general as well as final; but it is sufficient if it be so far final that the decision of the question will be final upon all parties, and that nothing which can happen to the partnership will make it necessary or just to review this decision. (*g*)

account stated. So held, per Washington, J., in Lamalere *v.* Caze, 1 Wash. C. C. 437. But see Killam *v.* Preston, 4 W. & S. 14. See also Beach *v.* Hotchkiss, 2 Conn. 425; Robinson *v.* Williams, 8 Met. 454.

(*g*) It seems to be well established by the English cases (to some of which we have already alluded), that the balance for which a suit will lie between partners is not necessarily a general balance of all the accounts between them, but may be a balance in respect of specific matters, which, by agreement, have been insulated from the general accounts. So in Jackson *v.* Stopherd, 2 Cr. & M. 361; Coffee *v.* Brian, 3 Bing. 54; Cross *v.* Cheshire, 7 Exch. 43; Brown *v.* Tapscott, 6 M. & W. 119. So where a balance of accounts is taken, and a note given as the balance, that must be paid; although there are subsequent accounts upon which the payee may eventually be found in arrears. Preston *v.* Strutton, 1 Anst. 50. The plaintiff and defendant were partners in a stage-coach company, which was dissolved in the month of November. The plaintiff's action was for the recovery of certain balances of accounts, by which it appeared that, during the partnership, a balance was struck every month; and that for the months of September, October and November, balances had been found due from the defendant to the plaintiff, though the balance for November had since been paid. It was held that the plaintiff might recover the balances in his favor on the September and October accounts. Brierly *v.* Cripps, 7 C. & P. 709; Carr *v.* Smith, 5 Q. B. 128. In Vermont, a partner can recover only a balance found due to him upon dissolution, and after the adjustment of all the partnership dealings. Spear *v.* Newell, 13 Vt. 288; Warren *v.* Wheelock, 21 Vt. 323. See Sawyer *v.* Proctor, 2 Vt. 580. The same is true in Illinois. Davenport *v.* Gear, 3 Ill. 495; Chadsey *v.* Harrison, 11 Ill. 151; Burns *v.* Nottingham, 60 Ill. 531; and is apparently the doctrine of the following cases: Graham *v.* Holt, 3 Ired. 300; Pope *v.* Randolph, 13 Ala. 214; Killam *v.* Preston, 4 W. & S. 14; Halderman *v.* Halderman, 1 Hempst. 558; Chase *v.* Garvin, 19 Me. 211. The proposition of the text is sustained in the case of Gibson *v.* Moore, 6 N. H. 547, in which all the leading authorities are reviewed, and a conclusion reached which seems to be founded both upon the better authority and the better reason. There the plaintiff and defendant had been partners. A controversy having arisen respecting some of their partnership affairs, they referred the matters in dispute to arbitration. The referees awarded that the defendant should pay the plaintiff $88.08, and the defendant promised to pay the award. But there had been no settlement of the general concerns of the partnership, nor any final balance struck. The present action was assumpsit on the award, and the court held that it might be maintained. Parker, J., said: "In the present case, there has been no final balance struck. The settlement of the partnership concerns generally still remains to be made. But, by agreement between the parties, in relation to a specific portion of the partnership transactions a final adjustment has been made. The partners have agreed to close thus far, and one has agreed to pay the other a certain sum notwithstanding. Nor is it of any importance that the debts of the partnership are not all paid, if such be the fact. Creditors cannot object. They will have the responsibility of both partners still, nor is the payment of money by one partner to the other to their prejudice. If it was, that could not prevent the partners from adjusting the concerns between themselves, so as to create a liability from one to the other. They are not parties here, nor their rights in question. If partners can pledge the partnership property for the debt of an individual partner, and creditors cannot hold it (Whitney *v.* Dean, 5 N. H. 249), they

§ 195. **What is a Settlement of Accounts?** — It is of no importance how the settlement has been made; whether by the parties, or by law, or by arbitration. (*h*) Indeed, a suit on an award has been maintained, where the partners submitted "all differences" between them to the arbitrators, on the ground that an award in such a case is a final settlement of the partnership: and this rule was applied in one case where the plaintiff could not have sued the defendant on the agreement to submit. (*i*)

So where the settlement did not embrace all the debts, some of no great amount being left outstanding, the plaintiff was permitted to enter a *remittitur* as to these. (*j*) It is said that if there be a dissolution or expiration of the period of partnership, no partner can, without the consent of his copartner, assume all the outstanding debts as belonging to him, and, allowing their full value, so strike a balance, and sue his copartner. (*k*) But it must be true that the mere existence of outstanding debts ought not, of itself, to defeat the right of a partner to an action at law, if everything but these debts is settled and determined, and he is willing either to take them all at their face, or allow and transfer them all to his partner as of no value whatever. (*l*)

§ 196. **Mistake in Accounts.** — If the accounts have been

may surely make any adjustment of the partnership interests among themselves that they think expedient." And see, upon the same point, Sawyer *v.* Proctor, 2 Vt. 580; Van Ness *v.* Forrest, 8 Cranch, 30.

It seems to be established, both in England and in this country, that, if the partnership affairs are so nearly adjusted that there remains but a single item to liquidate, one partner may maintain an action against his copartner for a balance due him growing out of the partnership transactions, such balance being so far final as to remove the difficulty as to partnership. Robson *v.* Curtis, 1 Stark. 78; Bovill *v.* Hammond, 6 B & C. 149, per Bayley, J., *dissentiente;* Musier *v.* Trumpour, 5 Wend. 274; Westerlo *v.* Evertson, 1 Wend. 534; Gibson *v.* Moore, 6 N. H. 549; Clark *v.* Dibble, 16 Wend. 603; Byrd *v.* Fox, 8 Mo. 574; Brubaker *v.* Robinson, 3 Pen. & W. 295; Van Amringe *v.* Ellmaker, 4 Barr, 283.

(*h*) Henly *v.* Soper, 8 B. & C. 16, 20. [Abell *v.* Phillips (Ky.), 13 S. W. 109.] See Gibson *v.* Moore, 6 N. H. 547; Brierly *v.* Cripps, 7 C. & P. 709; Preston *v.* Stratton, 1 Anst. 50; Wray *v.* Milestone, 5 M. & W. 21.

(*i*) Winter *v.* White, 3 J. B. Moore, 674. See Burnell *v.* Minot, 4 J. B. Moore, 340.

(*j*) Brinley *v.* Kupfer, 6 Pick. 179. See cases at end of preceding note, and Sikes *v.* Work, 6 Gray, 433; Frink *v.* Ryan, 4 Ill. 322.

(*k*) Williams *v.* Henshaw, 12 Pick. 378.

(*l*) Rockwell *v.* Wilder, 4 Met. 556, 561. The existence of outstanding debts due the firm will not necessarily defeat an action of assumpsit between partners for a balance, if the plaintiff show that the outstanding debts are incapable of collection, and thus that the judgment rendered will make a final settlement between the partners. And in such case, especially if an assignment of all the outstanding debts be seasonably given or tendered to the other party, the action may be sustained. Per Morton, J., in Williams *v.* Henshaw, 11 Pick. 79.

settled, and one partner can prove that he paid too much to the other, by some mistake or ignorance of fact or of accounting, there would not seem to be any reason — unless one should grow out of the peculiar circumstances of the case — to prevent him from recovering, at law, what he has thus overpaid. (*m*)

In New Hampshire, it is provided by statute that "any copartner or joint-owner may maintain an action of assumpsit against one or more of his copartners or joint-owners, to recover his just share of any goods or chattels, choses in action, or the proceeds thereof, received by such copartners or joint-owners, and not accounted for, delivered, paid, or otherwise settled for on demand." (*n*)

§ 197. **Contract to Render Accounts.** — If, in the articles of partnership, or even independently of them, one partner cove-

(*m*) Bond *v.* Hays, 12 Mass. 34; Chase *v.* Garvin, 19 Me. 211. If an account between partners has been stated, in which there is a manifest error in the figures, or in the principles upon which it is adjusted, the amount really due to the injured party may be recovered in assumpsit, leaving the dissolution and settlement otherwise unaffected. But where there is no actual adjustment of accounts, and one partner purchases the interest of another for a gross sum, but the purchase is affected by fraud, the defrauded partner may wholly avoid the contract, and have the accounts reopened; but his remedy is in equity. Chase *v.* Garvin, *supra.*

Upon the principle stated in the text, if, after the dissolution of a partnership, settlement of the accounts, and division of the profits, some of the former partners, from causes arising subsequently to the dissolution, are compelled to incur heavy expenses on the account of the former partnership, an action would apparently lie by them, against the other partners, to recover their proportion of such expenditure. Graham *v.* Robertson, 2 T. R. 282. See Kennedy *v.* M'Fadon, 3 Harris & J. 194. So if a partnership has been dissolved, and the partnership accounts adjusted, and one partner is afterwards obliged to pay an outstanding claim not provided for, he may maintain assumpsit against his copartner for the proportion of it which the latter ought to pay by reason of his joint liability. Brown *v.* Agnew, 6 W. & S. 235, 238. [Whetstone *v.* Shaw, 70 Mo. 575.] See Dickinson *v.* Granger, 18 Pick. 315, 317; Kelley *v.* Kauffman, 18 Pa. 351. But an agreement between two partners after dissolution, to the effect that they would "quit even" to avoid the expenses of a chancery suit, does not authorize one to maintain an action at law against the other to recover contribution for a partnership debt subsequently paid. De Jarnette *v.* McQueen, 31 Ala. 230. See Fanning *v.* Chadwick, 3 Pick. 420. One partner may sue another for money advanced, if the transaction be single, not involving the rights of creditors, or an adjustment of partnership accounts. Russell *v.* Grimes, 46 Mo. 410; Finlay *v.* Stewart, 56 Pa. 183. See also Wells *v.* Simonds, 51 How. Pr. 48. Or for his share of the declared profits, if by mutual agreement one partner is made general manager, and is from time to time to pay over declared dividends of profit to the others. Wadley *v.* Jones, 55 Ga. 329. Or for his share of the assets after dissolution and actual division. Hunt *v.* Morris, 44 Miss. 314; Dakin *v.* Graves, 48 N. H. 45. Or for money paid on a firm debt, which, on dissolution, the other partner had agreed on receipt of the assets to pay. Hinkie *v.* Reid, 43 Ind. 300. Or for a sum agreed by one partner to be paid to the other, for his interest in the concern. Wells *v.* Carpenter, 65 Ill. 447.

(*n*) Revised Statutes of New Hampshire, ch. 180, § 4, p. 358.

nants with another that he will account, it seems clear that an action of covenant lies for a breach. (*o*) And it was said, some years since, in Massachusetts, that assumpsit would lie on such a promise between partners. (*p*) Such an action would be maintained now everywhere.

§ 198. **Demand for Contribution.** — A difference has been made between an action at law between partners for contribution, and those we have been considering, for which it is not easy to see sufficient reason. Courts, at least in England, seem to have held, or judges have said, that a partner who has paid money for the partnership, may, generally, sue his copartners for contribution. (*q*)

(*o*) Foster *v.* Allanson, 2 T. R. 479; Want *v.* Reece, 1 Bing. 18; Owston *v.* Ogle, 13 East, 538; Duncan *v.* Lyon, 3 Johns. Ch. 362; Bailey *v.* Starke, 6 Ark. 191. See Niven *v.* Spickerman, 12 Johns. 401.

(*p*) Wilby *v.* Phinney, 15 Mass. 120.

(*q*) The rule usually laid down upon this point is, that contribution may be obtained in an action of assumpsit by one partner against another, for money laid out for the defendant's use. But it has always rested rather upon the *dicta* of eminent judges than upon the authority of adjudged cases, and, in the general form in which it has been customary to state it, may be considered as no longer supported even by the weight of English authority. See Abbott *v.* Smith, 2 W. Bl. 947. Other cases and *dicta* which are sometimes cited in support of the right to contribution between partners, we have already referred to; and they are, we think, better explained upon other grounds. See Wright *v.* Hunter, 5 Ves. 792; § 187, and note; Holmes *v.* Williamson, 6 Maule & S. 159; Blackett *v.* Weir, 5 B. & C. 385, 388; Evans *v.* Yeatherd, 2 Bing. 133. Wooley *v.* Batte, 2 C. & P. 417, is, perhaps, the most direct adjudication in favor of contribution at law between partners. See Milburn *v.* Codd, 7 B. & C. 419, per Bailey, J.

Mr. Gow, in the first and second editions of his work on Partnership, laid down the rule that, "in an action of assumpsit, for money paid to his use, one partner may enforce from his copartner contribution towards a debt, which the single partner may have discharged, but for which the firm were jointly liable." Gow on Part. (2d ed.) 90. In the subsequent editions, however, the rule is greatly qualified, and its operation restricted to the case of partners in a single transaction. For the rule in its changed and limited shape, he cites numerous cases. Abbott *v.* Smith, 2 W. Bl. 947; Merryweather *v.* Nixon, 8 T. R. 186; Evans *v.* Yeatherd, 2 Bing. 133; Herries *v.* Jamieson, 5 T. R. 556, per Lord Kenyon; Ansell *v.* Waterhouse, 6 M. & S. 390, per Bayley, J.; Holmes *v.* Williamson, 6 M. & S. 158; Carlen *v.* Drury, 1 Ves. & B. 157; Wright *v.* Hunter, 5 Ves. 792; Burnell *v.* Minot, 4 J. B. Moore, 340. But these cases seem to be very far from establishing the proposition for which they are cited. In some of them are to be found *dicta* of judges asserting the general right of contribution between joint defendants; in some, contribution is actually enforced, but between persons who are not partners, but simply joint contractors, or otherwise jointly connected; while in others, the question before the court is the competency of a witness, his competency depending upon his liability to contribute, *either in law or in equity*, to a demand which his testimony establishes. The distinction, if any, which these cases suggest, is one between persons who are simply joint contractors, and between those who hold to each other the closer relation of partners; that is, it is between parties who are partners, and those who are not, and not between different kinds of partners. And the difference as to the right of contribution, between those who are partners and those who are merely co-

This is the more remarkable, because the whole doctrine of contribution is originally only equitable. Every reason against other actions at law, between copartners, would seem to apply to those for contribution. One partner pays money to-day, and another to-morrow; and the only way of determining the questions which might arise from such payments would seem to be, to credit the paying partner with the amount he pays, and give this item its due place and weight in the general account of the partnership. We find but little, or rather nothing, in American jurisprudence, (*r*) and nothing in the reason of the case, to sustain an action at law by a partner against his partner for contribution, unless the facts of the case and the whole character of the transaction insulate it from the general accounts of the partnership, and bring it within those reasons which, as we have said, seem to us sufficient to sustain any action at law between partners. (*s*)[1]

debtors or co-contractors, as well as the reason for it, is obvious. They are thus stated by the court in White *v.* Harlow, 5 Gray, 463, 468: "Where two independent parties owe a joint debt, and one pays the whole, which he may be compelled to do by the creditor, the law, in the absence of any express agreement of such debtors, implies a promise of the co-debtor, to him who has thus paid the whole, to pay him one-half of the common debt thus discharged. But, when one partner thus pays the whole debt, the law implies no such promise: it merely authorizes him to charge the whole to the firm in partnership account, of which he will have the benefit, as a credit on settlement of that account, voluntarily, or by a suit in equity."

(*r*) The American authorities, indeed, seem to be against the right of contribution as between partners. And in this respect no distinction is made between trading and professional partnerships. Westerlo *v.* Evertson, 1 Wend. 532; Gridley *v.* Dole, 4 Mill, C. R. 486; Lawrence *v.* Clark, 9 Dana, 257; Kennedy *v.* McFadon, 3 H. & J. 194; Bracken *v.* Kennedy, 4 Ill. 564; Brown *v.* Agnew, 6 W. & S. 238; Roberts *v.* Fitter, 13 Pa. 265; Haskell *v.* Adams, 7 Pick. 59; White *v.* Harlow, 5 Gray, 463; Morin *v.* Martin, 25 Mo. 360; De Jarnette *v.* McQueen, 31 Ala. 230.

(*s*) As where one partner claims contribution of another in respect of some transaction which has been separated from the partnership accounts; or has arisen after dissolution and settlement; or is a consequence, not of the relations of the partners *inter se*, but of their relations to third persons. Graham *v.* Robertson, 2 T. R. 232; Brown *v.* Agnew, 6 W. & S. 235; Kelly *v.* Kauffman, 18 Pa. 351. Or where the parties to the suit for contribution are to be regarded as joint contractors, or in any other light than as partners. Ansell *v.* Waterhouse, 6 M. & S. 390; Holmes *v.* Williamson, 6 M. & S. 158; Burnell *v.* Minot, 4 J. B. Moore, 340;

[1] The general rule is that a partner cannot sue for contribution, even after dissolution, till the accounts are settled; since it cannot be known until that time whether one partner is indebted to the firm or to the other partner. *Ante,* § 185, note 1.

But after an accounting has been had, one partner who has been since called upon to pay a firm debt not included in the account may maintain an action for contribution. Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547; Jepson *v.* Beck, 78 Cal. 540, 21 Pac. 184; Whetstone *v.* Shaw, 70 Mo. 575; Logan *v.* Trayser, 77 Wis. 579, 46 N. W. 877.

SECTION III.

QUESTIONS BETWEEN PARTNERS COGNIZABLE ONLY IN EQUITY.

§ 199. **Equitable Jurisdiction over Partnership Affairs.** — The reasons which have already been given for the refusal of courts of law to sustain generally actions between partners, indicate, with sufficient clearness, the classes of cases in which courts of equity give relief. It may be said that they will give relief wherever law will not, and that it is the general rule that law will not sustain suits between partners. The preceding section may be considered as stating the exceptions to this rule; and all cases which do not come under one or other of these exceptions come under the rule.

§ 200. **Demands between Firms having a Common Member.** — One important class of actions, in which suits at law are not maintainable, needs more particular attention. It consists of cases in which one firm has a cause of action against another firm, and there is some one person who is a member of both firms. There can be no action at law between those firms. (*t*) There is a rule

Edger *v.* Knapp, 6 Scott N. R. 707, 712; Sedgwick *v.* Daniell, 2 H. & N. 319; Forbes *v.* Webster, 2 Vt. 58; Dupuy *v.* Johnson, 1 Bibb, 562. Or where there is a special agreement between partners authorizing one of them to lay out money on partnership account, with a stipulation that they will each contribute, in due proportion, such sums as may be necessary to reimburse him. Brown *v.* Tapscott, 6 M. & W. 119; Geddes *v.* Wallace, 2 Bligh, 270; Waugh *v.* Carver, 2 H. Bl. 235; Hutton *v.* Eyre, 6 Taunt. 289; *In re* Webb, 2 J. B. Moore, 500; Murray *v.* Bogert, 14 Johns. 318. There must be actual payment of a joint debt, before one partner can recover contribution. Maxwell *v.* Jameson, 1 B. & Ald. 51; Taylor *v.* Higgins, 3 East, 169; Cumming *v.* Hackley, 8 Johns. 202. See Dunn *v.* Lee, 1 J. B. Moore, 2; Barclay *v.* Gooch, 2 Esp. 571; *Ex parte* Sergeant, 1 Glyn & J. 183. Neither will a suit for contribution be maintained, either at law or in equity, in consequence of a recovery against one partner under a judgment in an action on a tort. Merryweather *v.* Nixon, 8 T. R. 186; Ansell *v.* Waterhouse, 6 M. & S. 390; Vose *v.* Grant, 15 Mass. 521; Thweatt *v.* Jones, 1 Rand. 328; Dupuy *v.* Johnson, 1 Bibb, 565; Pecks *v.* Ellis, 2 Johns. Ch. 131; Lingard *v.* Bromley, 1 Ves. & B. 114, 117. See also Seddon *v.* Connell, 10 Sim. 79, 86; Attorney-General *v.* Wilson, Craig & Ph. 1, 28; Miller *v.* Fenton, 11 Paige, 18. As to rights arising from payments of money under illegal contracts, see Aubert *v.* Maze, 2 B. & P. 371; *Ex parte* Bell, 1 M. & S. 752; Watson *v.* Fletcher, 7 Gratt. 1; Sullivan *v.* Greaves, Park on Ins. 8. See Booth *v.* Hodgson, 6 T. R. 405; Tenant *v.* Elliott, 1 B. & P. 3; Farmer *v.* Russell, 1 B. & P. 296; Sharp *v.* Taylor, 2 Phillips Ch. 801, 818; Thompson *v.* Thompson, 7 Ves. 473; Anderson *v.* Moncrieff, 3 Dess. Ch. 124. See Edgar *v.* Fowler, 3 East, 222. A partner who redeemed lands of the firm from execution was held entitled to contribution, in Downs *v.* Jackson, 33 Ill. 464.

(*t*) Bosanquet *v.* Wray, 6 Taunt. 598;

which, though technical, or rather formal, would suffice to prevent it. It is the rule which prevents the same party from being both plaintiff and defendant of record; for then a man would sue himself. We have already remarked that a partnership possesses a kind of personality, and that it is, for many purposes, a kind of corporation. The law of partnership, as it is incorporated into the common law, acknowledges this substantially as the foundation of its whole system; but it never acknowledges it *formally*. The names of all the partners — as a general rule — must be set forth, both as to the plaintiffs and the defendants. They should be described as "co-partners, under the name and style of A., B. & Co." But these words, however usual and proper, and for some purposes necessary, are, in law, words of description; and A. B. & C. can no more sue A. D. & E. than A. can sue A. In addition to this technical reason, however, it may be said that such suits would frequently involve an intricate combination of interests, to which the processes of law are not adequate. If the plaintiff firm recover, in such a case, A. would receive a sum which he must contribute to raise, and the account might possibly involve all of those of both partnerships. This, with the entire sufficiency of

Mainwaring *v.* Newman, 2 B. & P. 120; Moffatt *v.* Van Milligen, 2 B. & P. 124, note; Jones *v.* Yates, 9 B. & C. 532; Griffith *v.* Chew, 8 S. & R. 30; Portland Bank *v.* Hyde, 11 Me. 196; Eastman *v.* Wright, 6 Pick. 320, 321; Graham *v.* Harris, 5 Gill & J. 489; Burley *v.* Harris, 8 N. H. 235; Rogers *v.* Rogers, 5 Ired. Eq. 31; Calvin *v.* Markham, 3 How. (Miss.) 343; Green *v.* Chapman, 27 Vt. 236; Englis *v.* Furniss, 4 E. D. Smith, 587; Haven *v.* White, 39 Ill. 509. Upon the same principle, a plaintiff cannot summon himself, nor can several plaintiffs summon one of their own number, as a trustee, in the process of foreign attachment. Belknap *v.* Gibbens, 13 Met. 471. See Portland Bank *v.* Hyde, 11 Me. 196. And where there are two firms, with a partner common to each, in an action against one of them the other cannot be summoned as trustee; for the reason that the trustee process is a mode of enforcing *by a suit at law* the contract between the trustee and the principal debtor, for the benefit of the creditor of the latter. Denny *v.* Metcalf, 28 Me. 389.

In Pennsylvania, by act of April 14th, 1838, it was enacted that no action by partners or several persons against partners or several persons should abate, nor the action be defeated by reason of one or more individuals being or having been members of both firms, or being or having been of the parties plaintiffs, and also of the parties defendants, in the same suit; the acts and declarations of the partner or persons so being of both the parties, plaintiffs and defendants, to affect each party respectively to the same extent as the acts and declarations of the other partners or persons, plaintiffs or defendants, would affect the respective firms or parties; *provided*, that no act or declaration of the party shall be given in evidence in his own favor to the prejudice of others. For cases under this statute, or bearing upon it, see Hepburn *v.* Curts, 7 Watts, 300; M'Fadden *v.* Hunt, 5 W. & S. 468; Tassey *v.* Church, 5 W. & S. 468; McConkey *v.* Rogers, Brightly N. P. 450. [See *post*, § 229.]

equity for such cases, has doubtless prevented courts or legislatures from annulling or modifying this rule.[1]

§ 201. **Effect of Death, &c., of the Common Member.** — It is applied with equal strictness after the death of the partner common to both firms, or of any other partner, and after the dissolution of the partnership in any way. (*v*) The foundation of the rule is, that a party cannot sue himself, because he cannot contract with himself; and, therefore, there never was a valid contract at law between these two firms. (*w*) But an action may be maintained on any transactions subsequent to the death of the common partner, or his withdrawal from either firm. (*x*) So far as this disability is merely technical, it may be doubted whether it exists in the case of a dormant or secret partner.

§ 202. **Dormant Partner as Party to Suit.** — The rule seems to be, that the creditors of a partner are not obliged to include the name of a secret partner among the defendants. (*y*) There is an obvious

(*v*) Bosanquet *v.* Wray, 6 Taunt. 598; De Tastet *v.* Shaw, 1 B. & Ald. 664; Burley *v.* Harris, 8 N. H. 235; Portland Bank *v.* Hyde, 11 Me. 196. See Englis *v.* Furniss, 4 E. D. Smith, 587. And in Ohio, a surviving partner cannot maintain proceedings *in rem* for supplies furnished by the copartnership to the vessel of his copartner; the water-craft law of that State not creating a new, artificial person, with capacity to contract, but merely giving an accumulative remedy against the owner himself. Thompson *v.* Steamboat J. D. Morton, 2 Ohio St. 26. See Miller *v.* Andres, 13 Ga. 366. [See *post*, § 231.]

(*w*) Rose *v.* Poulton, 2 B. & Ad. 822.

(*x*) Bosanquet *v.* Wray, 6 Taunt. 598. One member of a firm may sue another firm of which his copartners were members, on a covenant executed to him by that firm. Mullany *v.* Keenan, 10 Ia. 224.

(*y*) It was held in one case, Dubois *v.* Ludert, 5 Taunt. 609, that if a plaintiff sues a defendant, with whom alone he believes he has contracted but who in truth has a dormant partner, the defendant may plead in abatement that his partner ought to be joined, unless it be shown that the interest of the plaintiff is thereby materially altered, and that it is no injury to the plaintiff to compel him to bring a new action against the two, and to allow them therein to set off a debt contracted by the plaintiff, as the plaintiff believed, to the other partner alone, but in which both partners are in truth equally interested. But this case may now be considered as overruled, and the rule to be, that, if the plaintiff have no means of knowing the existence of the partnership, the partner sued cannot plead in abatement the non-joinder of a dormant partner. De Mautort *v.* Saunders, 1 B. & Ad. 398; *Ex parte* Hodgkinson, 19 Ves. 294; *Ex parte* Norfolk, 19 Ves. 458; *Ex parte* Watson, 19 Ves. 462; *Ex parte* Matthews, 3 Ves.

[1] The principle is well established that no action at law will lie between firms having a common member, for the reasons given in the text. Hall *v.* Kimball, 77 Ill. 161; Crosby *v.* Timolat, (Minn.) 52 N. W. 526; Beacannon *v.* Liebe, 11 Ore. 443, 5 Pac. 273. But a bill in equity will lie in such a case. Crosby *v.* Timolat, (Minn.) 52 N. W. 526.

Where a specific debt, not part of a general account, is due from one firm to the other, it may be assigned, and in a jurisdiction where the assignee of a chose in action may sue in his own name, the assignee may sue the debtor firm. Beacannon *v.* Liebe, 11 Ore. 443, 5 Pac. 273. The same is true at common law in case of the indorsement of mercantile paper.

reason for this. Why should the creditor lose a remedy, and the firm acquire a protection, merely by the firm's keeping secret the name of one of them? or why should the creditor be bound to place on record a name which he does not know, and is hindered from knowing by his debtors? The rule seems to go further, however. If the creditor knows the name of a secret partner, it would seem that he is under no obligation to make him defendant. (*z*) And there is some reason for this; partly in the advantage of a uniform rule, and much more in the principle that the firm should be estopped from requiring that another should make public what they themselves choose and endeavor to keep private.

But the rule is sometimes said to go still further, even to the converse proposition, that the firm, in their own action, need not name a dormant or secret partner; and, therefore, the want of his name cannot be taken advantage of, by abatement or otherwise. The reasons which apply to the other side of this rule have no application whatever to this. But, as a mere matter of convenience, there is perhaps no objection to this proposition, although we are not certain that the authorities, when well considered, sustain this rule where the firm is plaintiff. (*a*) But to go further: If a firm

& B. 126; Baldney *v.* Ritchie, 1 Stark. 338; Doo *v.* Chippenden, cited in Abbott on Shipping; Sylvester *v.* Smith, 9 Mass. 119; [Tynberg *v.* Cohen, 67 Tex. 220, 2 S. W. 734.] See Cookingham *v.* Lasher, 2 Keyes, 454, and Bird *v.* McCoy, 22 Iowa, 549.

(*z*) If he was unaware of the dormant partner, at the time of making the contract sued upon, he may or may not, at his election, join the dormant partner. *Ex parte* Hamper, 17 Ves. 412; *Ex parte* Liddle, 2 Rose, 36; Grellier *v.* Neale, 1 Peake, 146; Robinson *v.* Wilkinson, 3 Price, 538; *Ex parte* Layton, 6 Ves. 438; Hoare *v.* Dawes, 1 Doug. 371; Wilson *v.* Wallace, 8 S. & R. 55; Page *v.* Brant, 18 Ill. 37; Cleveland *v.* Woodword, 15 Vt. 302; Blin *v.* Pierce, 20 Vt. 25; Hagar *v.* Stone, 20 Vt. 106. But if the plaintiff sue only the ostensible members of a firm, and the non-joinder of the rest is objected to, it will be for the jury to say whether, at the time the plaintiff contracted, he knew or had the means of knowing that others were jointly interested with the defendants; or, in other words, to decide with whom the contract was intended to be made. Stansfield *v.* Levy, 3 Stark. 8; Mullett *v.* Hook, 1 Moody & M. 88; De Mautort *v.* Saunders, 1 B. & Ad. 398; *Ex parte* Layton, 6 Ves. 438; Davies *v.* Hawkins, 3 M. & S. 488, 492; Bonfield *v.* Smith, 12 M. & W. 405. See Robinson *v.* Wilkinson, 3 Price, 538. Where, by direction of the plaintiff, the writ was served on one only of two partners in trade, when the declaration showed that the plaintiff knew the names of both, and a verdict was obtained upon a plea of non-assumpsit, pleaded by the partner on whom the writ was served, it was held that the judgment should be arrested. Shields *v.* Oney, 5 Munf. 550.

(*a*) Skinner *v.* Stocks, 4 B. & Ald. 437. See Ross *v.* Decy, 2 Esp. 469, note; George *v.* Claggett, 7 T. R. 361, note; Rodwell *v.* Redge, 1 C. & P. 220; Gordon *v.* Ellis, 2 C. B. 821; Cothay *v.* Fennell, 10 B. & C. 671; Alexander *v.* Barker, 2 Cr. & J. 133; Robson *v.* Drummond, 2 B. & Ad. 303.

It appears, from the cases just above cited, to be the doctrine of the English cases that the dormant partner may be coplaintiff with the ostensible partner in a suit upon a contract made by the latter upon partnership account. As to the other

should seek to sue another firm, when one partner in either is a secret partner in the other, because he need not be named in that one, or even if he is secret in both, and therefore need not be named in either, we should have much doubt whether such a suit could be maintained against the substantial reasons which oppose it, until it were otherwise determined by adjudication.

And if it be said that, if the partner common to both be only nominal (*b*) in one, or both, having no real interest whatever, such a suit may be maintained, we should have some doubt if he were nominal in both, and more, if he were nominal in one and actual in the other; because a merely nominal partner is a perfectly real partner as to those parties. It seems to be agreed that, if the action is brought on a written contract, in which all the names are used, the want of interest in one does not sustain an action without him, or an action which makes him both plaintiff and defendant. (*c*) And we should be inclined to think the relation of part-

question, whether in such a case the secret partner must join or whether the ostensible partner may sue alone, we have already indicated the principles by which, we think, it should be answered. The English cases seem rather to favor the doctrine that the ostensible partner may, if he chooses, sue without joining the secret members of the firm. He is regarded as an agent, contracting, in his own name, for an undisclosed principal, in which case either the agent or the principal may sue upon the contract. Sims *v.* Bond, 5 B. & Ad. 389. See Mawman *v.* Gillett, 2 Taunt. 327; Lloyd *v.* Archbowle, 2 Taunt. 324; Lereck *v.* Shaftoe, 2 Esp. 468; Brassington *v.* Ault, 2 Bing. 177; Steel *v.* Western, 7 J. B. Moore, 31.

In the United States the rule of the English courts has been followed, and it has been generally held, that the ostensible partner is the only necessary party plaintiff to a suit to enforce a partnership contract, though the dormant partner may be joined. Mitchell *v.* Dall, 2 H. & G. 159, 171; Clarkson *v.* Carter, 3 Cow. 84; Hawley *v.* Cramer, 4 Cow. 717; Clark *v.* Miller, 4 Wend. 628; Boardman *v.* Keeler, 2 Vt. 65; Lapham *v.* Green, 9 Vt. 407; Morton *v.* Webb, 7 Vt. 123; Curtis *v.* Belknap, 21 Vt. 433; Lord *v.* Baldwin, 6 Pick. 352; Wood *v.* O'Kelley, 8 Cush. 406; Wilson *v.* Wallace, 8 S. & R. 55; Barstow *v.* Gray, 3 Me. 409; Ward *v.* Leviston, 7 Blackf. 466; Monroe *v.* Ezzell, 11 Ala. 603; Bank of St. Mary's *v.* St. John, 25 Ala. 566, 621–624; Gregory *v.* Bailey, 4 Harr. (Del.) 256; Speake *v.* Prewitt, 6 Tex. 252; Jackson *v.* Alexander, 8 Tex. 109; Keane *v.* Fisher, 9 La. Ann. 70, 74. But when the ostensible and secret partners all sue, on a partnership contract, the defendant may make the same defences, whether by offset or otherwise, as if the action had been brought in the name of the acting partner with whom the contract was actually made. Hilliker *v.* Loop, 5 Vt. 116; Lapham *v.* Green, 9 Vt. 407; Lord *v.* Baldwin, 6 Pick. 352; Ward *v.* Leviston, 7 Blackf. 466; Rose *v.* Murckie, 2 Call, 409; Beach *v.* Hayward, 10 Ohio, 455. The right of set-off in such cases is provided for by statute in Massachusetts, Pub. Stat. ch. 168, § 9. In New York, since the code, which provides (§ 111) that "every action must be prosecuted in the name of the real party in interest," a dormant partner is a necessary party as a plaintiff in an action for the recovery of a partnership debt, founded on a partnership contract, whether the relief sought be legal or equitable. Secor *v.* Keller, 4 Duer, 416.

(*b*) *Ante*, § 96.

(*c*) Guidon *v.* Robson, 2 Camp. 302.

nership, and the law springing out of this relation, should have much the same effect as a written contract.

§ 203. **Demand of Firm grounded on the Tort of a Member.** — This question has arisen where a firm has a right of action, and the cause of action is, in the whole or in part, the fraud of one of the partners. If A. fraudulently transfers his own property, he cannot, generally speaking, bring any action to recover this property, because he cannot avoid his own act, nor found his right upon his wrong-doing. But if A., of the firm of A., B., & Co., fraudulently transfers the negotiable paper of A., B., & Co., in payment of his own debt, under circumstances which would make the transfer null as to the partnership, it has been objected to the action of A., B., & Co. for the paper, that A. cannot be a plaintiff in such an action and that B. & Co. cannot sue without A. (*d*)

But such an objection is wholly technical, nor do we think that even on technical ground it is unanswerable. The law is familiar with instances of a party's name being used by others, for their exclusive benefit, and against his will. An assignee for value of a chose in action so sues in the name of the assignor; and, after notice given of the assignment, the debtor is bound only to the assignee, and the assignor, who is nominal plaintiff, can neither withdraw nor defeat the action, nor release the judgment; having, in fact, no more power over the action, and no more to do with it, than if his name were not used. (*e*) If there be some objection to the application of a similar rule to the case under consideration, there may be less to permitting B. & Co. to sue, on the ground that the fraud of A. removes him from all interest and from the case. Nor are cases wanting which, at least, incline to this view. (*f*)

(*d*) Jones *v.* Yates, 9 B. & C. 532. Sykes & Bury being in partnership, Sykes gave the moneys and bills of the partnership in payment of his separate debt, and in fraud of his copartners, the party receiving the property being privy to the fraud. Sykes & Bury having become bankrupt their assignees brought trover for the bills, and assumpsit for the money. The court of King's Bench held, that the plaintiffs could not recover. The doctrine of Jones *v.* Yates was approved in Greeley *v.* Wyeth, 16 N. H. 10. See Wallace *v.* Kelsall, 7 M. & W. 264, 273; Gordon *v.* Ellis, 7 M. & G. 607, 622; Brewster *v.* Mott, 5 Ill. 378; Daniel *v.* Daniel, 9 B. Mon. 195; Buck *v.* Mosley, 24 Miss. 170; Goode *v.* McCartney, 10 Tex. 193; Nall *v.* McIntyre, 31 Ala. 532. See opinion of Parker, C. J., in Greeley *v.* Wyeth, 10 N. H. 18, and of Bigelow, J., in Homer *v.* Wood, 11 Cush. 68. Craig *v.* Hulschezer, 34 N. J. 363. [Where one partner wrongfully delivered partnership property to his individual creditor, the other partner could not replevy the property, but must go into equity. Hoff *v.* Rogers, 67 Miss. 208, 7 So. 358.]

In Pennsylvania, where equitable remedies are administered through the medium of common-law forms, the English rule, as laid down in Jones *v.* Yates, has been distinctly denied any operation. Purdy *v.* Powers, 6 Barr, 492.

(*e*) 1 Pars. on Cont. (5th ed.) 230.

(*f*) There are *dicta* to the effect, that

Even if it should be held that a partner cannot release or assign to his copartner his share of a partnership debt, so as to authorize a suit by the partner alone, — a proposition which we do not think would now be universally held, although an unavoidable inference from the strict and technical rules of the common law, — it does not necessarily follow that the same rule would be applied where a partner destroys or loses his right by his fraud. The true objection is, so far as there is any one of substance, that if the firm or the other partners alone recovered, it would be recovered as the property of the firm, and the fraudulent party would have his share. It must be admitted that this objection has much weight. But perhaps it might be obviated by reduction or severance of damages, by set-off, or recoupment, or in some other similar way, at law, (*g*) as well as it could be in equity. And it certainly would be a great hardship to deny to the innocent parties any relief, either at law or equity. (*h*) [1]

in such a case the injured partners could not sue without joining their fraudulent copartner; since, the action being *ex contractu* and the contract joint, the remedy must also be joint, and the partners can have no joint capacity, except when all sue together. See opinion of Lord Tenterden, C. J., in Jones *v.* Yates, 9 B. & C. 539; of Bigelow, J., in Homer *v.* Wood, 11 Cush. 64. In Longman *v.* Pole, Moody & M. 223, Lord Tenterden, C. J., in summing up, said: "I think, in point of law, this action is maintainable; if a person colludes with one partner in a firm to enable him to injure the other partners, I think they can maintain a joint action against the person so colluding." Perhaps, however, this case is distinguishable, on the ground that the action was *case* for a tort. The following case is somewhat more in point. Assumpsit for goods sold and delivered. The defendant's counsel stated that the plaintiff and one Morgan were in partnership together; and that, on a dissolution of that partnership, it was agreed between them that Evans should receive some of the debts, and Morgan the others. This debt was to be paid to Morgan, and the defendant had accordingly paid it to him. They called Morgan to prove this case, and Lord Kenyon held him a competent witness, as the judgment in this cause would not conclude his right. He was examined, and on his evidence the defendant obtained a verdict. Evans *v.* Silverlock, 1 Peake, 21.

(*g*) Daniel *v.* Daniel, 9 B. Mon. 195.

(*h*) "The defrauded partner may, perhaps, have a remedy in equity, by a suit in his own name against his partner and the person with whom the fraud was committed." Per Lord Tenterden, C. J., in Jones *v.* Yates, 9 B. & C. 539. "If a partner, fraudulently or improperly, without the consent of his partners, applies the partnership funds to his own private purposes, or for his own private profit or emolument, or invests the same improperly

[1] In a case of this sort the firm is the party wronged, not the innocent partners. They sue only as representing the firm, and should, it would seem, recover what the firm is entitled to, — namely, the whole amount of the firm property wrongfully taken. If the defendant has any rights in the matter, they are rights against the wrongdoing partner, not against the firm; and should be enforced against him individually. By his act in this case he cannot charge the firm property even with a lien. If the defendant has any right against the firm, it is to secure compensation for his loss out of the wrongdoing partner's distributive share of the assets, if any.

If a partner bring a bill in equity against the other partners, for a settlement of the affairs of the firm, the fraudulent character of the purpose for which the firm was formed is no defence. (*hh*)

§ 204. **Equity the Principal Tribunal for Partnership Questions.** — As equity is undoubtedly the principal tribunal for the abjudication of questions arising under the law of partnership, it is perhaps always able to give relief or remedy in cases which justly called for it, and cannot obtain it at law. (*i*) The most frequent instances of actual resort to equity are for a dissolution, or for a sale in the course of settlement by law; for an account, either general or particular, under some specific agreement; for contribution; (*j*) for the enforcement of rights, given either by law or by agreement of the partners; for a remedy for wrong done by a partner, or prevention of it by injunction against him; for an injunction against third parties, to prevent them aiding a partner in doing a wrong to the partnership; — sometimes for specific performance of agreement to enter into partnership; — in general, for all frauds or mistakes of fact; (*k*) — and in some cases for a manager or receiver of the business or the property of the partnership. Some

in his own name and for his own use, the other partners have a right, if they can distinctly trace the investment, and elect so to do, to follow the partnership funds into the new investment, and treat it as trust property held by that partner for the benefit of the firm, and as liable to be accounted for by any person into whose possession the same may come, who is not a *bonâ fide* purchaser for a valuable consideration, without notice." Per Story, J., in Kelley *v.* Greenleaf, 3 Story, 101. See Halstead *v.* Shepard, 23 Ala. 558; Purdy *v.* Powers, 6 Barr, 494.

(*hh*) Harvey *v.* Varney, 98 Mass. 118.

(*i*) See Hamilton *v.* Cummings, 1 Johns. Ch. 517.

(*j*) Wright *v.* Hunter, 5 Ves. 792; Abbot *v.* Smith, 2 W. Bl. 947, 949. Hence, in a case where five persons, in partnership as coach proprietors, had incurred a partnership debt, which the creditor, after the death of one of the partners, recovered in an action against the survivors, on a bill filed for that purpose against the representatives of the deceased partner, by the partner who had paid the damages and costs of the action, Sir John Leach decreed contribution, not only for the damages, but also for the costs. Thomas *v.* Lichfield, Rolls, H. T. 1831, cited in Collyer on Part. (Perkins' ed.) § 287. See Browne *v.* Gibbins, 5 Bro. P. C. 491, 3 Bro. P. C. 127 (Dublin ed.); Sells *v.* Hubbell, 2 Johns. Ch. 397; Jones *v.* Morgan, 16 Jur. 238.

(*k*) Throughout the whole of this section, we shall constantly meet with illustrations of the interference of equity, wherever fraud taints the intercourse of persons who became partners fairly, and on a basis of mutual good faith. Here we shall only remark that if, in the original agreement of association, there has been fraud, imposition, misrepresentation, or oppresion, equity may declare the partnership void *ab initio*. Howell *v.* Harvey, 5 Ark. 270, 278; Tattersall *v.* Groote, 2 B. & P. 135, per Lord Eldon; Hynes *v.* Stewart, 10 B. Mon. 429; Fogg *v.* Johnston, 27 Ala. 432. And the injured party may file a bill for the return of any premium he may have paid for the sake of becoming a partner. Per Lord Eldon, in Tattersall *v.* Groote, *supra*; Pillans *v.* Harkness, Colles P. C. 442; Hamill *v.* Stokes, Daniell, 20, 4 Price, 161. See Evans *v.* Bicknell, 6 Ves. 174, 182; Akhurst *v.* Jackson, 1

of these topics we shall consider separately. Here we would remark that the legal maxim, "*de minimis non curat lex*," is applied with a wide meaning in equity. It is a general rule, that good reasons must be given, and facts proved making out a strong case of considerable damage, before equity will interfere. (*l*)

The principal exception to this rule is in cases of fraud. Where that is clearly proved, a court of equity is usually prompt in suppressing or punishing the fraud, although the amount of injury resulting from it may not be large. (*m*) Perhaps it may be useful to advert to the question, whether money which a partner seeks to recover will be taken from or paid to the funds of the partnership; for this is very generally a test question, which may determine whether the proper remedy is at law or equity. Thus, we mentioned covenant or assumpsit as maintainable on an agreement to pay money before a partnership, and to establish or launch a partnership; but neither of these actions will be sustained, if the money when paid is to be paid out of the funds of the partnership, or if recovered is to be added or credited to those funds. (*n*)

It was said in the preceding section that actions at law will lie between partners, in general, on any contract, transaction, or indebtedness which is taken out of and separated from the partnership accounts, before, during, or after the partnership. Now, we have in the question, whether the money is either to come from or be paid to the partnership, or is to remain the benefit or loss of the partner only, and never to appear in the accounts of the partnership, perhaps the best way of determining whether the cause of action is so separated from the partnership as to be sufficient for a suit at law.

Swanst. 89; Colt *v.* Woollaston, 2 P. Wms. 154; Green *v.* Barrett, 1 Sim. 45; Blain *v.* Agar, 1 Sim. 37. Or for an account and a receiver. *Ex parte* Broome, 1 Rose, 69, 71. See, however, Clifford *v.* Brooke, 13 Ves. 131, and the comments upon the last two cases in 2 Hov. Supp. 327. And he will be restored, as far as possible, to his original situation. Hynes *v.* Stewart, 10 B. Mon. 429; Fogg *v.* Johnston, 27 Ala. 432. See Oldaker *v.* Lavender, 6 Sim. 239. But upon a bill by one partner against his copartners, for an account and his share of the profits, a fraud perpetrated by the plaintiff upon one of his copartners, in a transaction prior to and independent of the partnership, by means of which he procured the funds contributed as his share of the capital of the firm, is no ground for annulling or rescinding the contract of partnership. Ingraham *v.* Foster, 31 Ala. 123. See Stein *v.* Robertson, 30 Ala. 286.

(*l*) See *post*, ch. 14.

(*m*) The maxim, *de minimis non curat lex*, "is never applied to the positive and wrongful invasion of another's property." Per Cowen, J., in 5 Hill, 175.

(*n*) Bedford *v.* Brutton, 1 Scott, 245, 261, 262, 1 Bing. N. C. 407; Pearson *v.* Skelton, 1 M. & W. 504. See Andrews *v.* Ellison, 6 J. B. Moore, 199; Caldicott *v.* Griffiths, 8 Exch. 898, 9 04 per Maule, J.

SECTION IV.

ON THE METHODS AND PROCESSES OF EQUITY APPLICABLE IN CASES OF PARTNERSHIP.

§ 205. **Decree for Specific Performance.** — A decree for specific performance is one of the important and most frequent means of relief and remedy in equity. We have already spoken of it in reference to a prayer for this relief against one who refuses to carry into effect an agreement for a partnership. In general, it will be applied by equity, as between partners, whenever the performance of a certain duty, or of a distinct promise, is prayed for, which duty or promise the court can enforce or cause to be executed efficiently and adequately, while there is no adequate remedy at law for a breach of it. (*o*)

But, as has been already intimated, there must always be duties, as of general good conduct, of skill or care, or the like, which it is impossible for the court to regulate or enforce by a decree; and nothing is done in such cases unless a positive mischief is threatened, which may be prevented or remedied by injunction or other means. (*p*) Equity will grant this remedy only where the part-

(*o*) Thus, equity has enforced an agreement, made upon the dissolution of a partnership, that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other. Lingen *v.* Simpson, 1 Sim. & S. 600. So if one partner receives moneys, but does not enter the receipts in the partnership books, relief will be granted in equity. Goodman *v.* Whitcomb, 1 Jac. & W. 593. So, if the continuing and incoming partner agree to give the retiring partner their joint and several bond to indemnify him against the debts of the first partnership, it seems that this agreement may be specifically enforced. Warren *v.* Taylor, 8 Sim. 599. An injunction against the breach of a partnership covenant is often equivalent to a decree for specific performance; as where the active members of a firm are enjoined from using, in the joint business, any other than the name agreed upon in the articles as the style of the partnership. See *post* § 214.

(*p*) It was held, in quite a number of cases in England, that equity would not prohibit the violation of a negative term in an agreement, unless it had the power of enforcing the positive part of the same agreement, upon the principle that the court should not interfere at all, unless it could administer full and entire relief. Kemble *v.* Kean, 6 Sim. 333; Kimberly *v.* Jennings, 6 Sim. 340; Baldwin *v.* Useful Knowledge Society, 9 Sim. 393; Gervais *v.* Edwards, 2 Drury & W. 80. The same doctrine was asserted in the American case of Hamblin *v.* Dinneford, 2 Edw. Ch. 529. But the later English cases have adopted a different principle. Rolfe *v.* Rolfe, 15 Sim. 88; Dietrichsen *v.* Cabburn, 2 Phillips, 52; Lumley *v.* Wagner, 5 De G. & S. 485. It is now held that where a contract contains covenants to do certain acts, and also to abstain from doing certain acts, a court of equity has jurisdiction to restrain the breach of a negative, though it may have no power to compel specific performance of the affirmative covenants;

nership is for a definite period, or such decree is necessary to invest one of the partners with legal rights which he could not otherwise possess. (*pp*)

Thus, if a partner covenants to give his whole business time and attention to the concerns of the partnership, no specific performance would be decreed on a prayer setting forth that he was generally negligent and inattentive. But such a covenant would be construed as an enforcement of the rule of law, that a partner must not engage in other business which interferes with his duties to the firm or otherwise injures it; and the court would restrain a partner, under such covenant, from engaging in any independent business. (*q*) And if the plaintiff, in his bill for specific performance or in his separate bill, prays that an account of the profits of this forbidden business may be taken, and a share paid to them, as if it were done on their joint account, equity — supposing the justice of the case upon all its facts so to require — would grant this relief. (*r*) [1]

as in the case of an agreement by a musician to sing at a particular theatre, and not to sing at any other, in which case an injunction may be granted against the breach of the latter portion of the agreement But it seems that in such cases the court will not interfere, if it is apparent that its jurisdiction cannot be beneficially exercised. Ibid. In Lumley *v.* Wagner, *supra*, all the authorities are reviewed, and the principles governing the question elaborately discussed. See Johnson *v.* Shrewsbury, &c. R. Co., 3 De G., M. & G. 927.

The doctrine, that where a contract has both a positive and a negative term, and the positive term is of such a nature that performance cannot be compelled by equity, it will not interfere to prevent the violation of the negative term, seems never to have been applied to articles of partnership, though "it does not appear why cases of actual partnership should be more favored, in the exercise of the jurisdiction by injunction, than others." Per Lord Cottenham, in Dietrichsen *v.* Cabburn, 2 Phillips, 59. Thus in Kemble *v.* Kean, *supra*, Sir L. Shadwell, V. C., said: "In the case where the parties are partners, and one of the partners contracts that he shall exert himself for the benefit of the partnership, though the court, it is true, cannot compel a specific performance of that part of the agreement, yet, there being a partnership subsisting, the court will restrain that party (if he has covenanted that he will not carry on the same trade with other persons) from breaking that part of the agreement. *That is, in case of a partnership.*" See Morris *v.* Colman, 18 Ves. 437.

(*pp*) Whitworth *v.* Harris, 40 Miss. 483; Freeman *v.* Smith, 2 Wall. 160; Buxton *v.* Lister, 3 Atk. 383; Anonymous, 2 Ves. 629, 630; Birchett *v.* Bolling, 5 Munf. 442; Hibbert *v.* Hibbert, Collyer on Part. § 203.

(*q*) Kemble *v.* Kean, 6 Sim. 333; Morris *v.* Colman, 18 Ves. 437; *supra*, note (*p*).

(*r*) Somerville *v.* Mackay, 16 Ves. 382; Moritz *v.* Peebles, 4 E. D. Smith, 135.

[1] A contract for entering into a partnership cannot usually be enforced in equity. An agreement calling upon a party to engage in business is of course incapable of enforced specific performance. Morris *v.* Peckham, 51 Conn. 128; Buck *v.* Smith, 29 Mich. 166; Meason *v.* Kaine, 63 Pa. 335; Reed *v.* Vidal, 5 Rich. Eq. 289. Such terms of the articles as are capable of specific performance will be enforced by a court

§ 206. **Decree for Dissolution, and for Account.**—We connect these topics, in this section, because a court of equity frequently decrees an account between partners; almost always, however, where there has been or is to be a dissolution of the partnership. Indeed, courts of equity have intimated, with much distinctness, that they would not decree any account, unless there either was a dissolution, or the bill prayed for a dissolution. (*s*) As we have said, this is generally the case in point of fact; and there are reasons as well as high authority for the rule; reasons which, however, may perhaps be summed up in this: that a partner, who is driven to a court of equity as the only means by which he can get an account from his partner, may be supposed to be in a position which will be benefited by a dissolution; in other words, such a partnership as that ought to be dissolved. (*t*)

We apprehend, however, that the question is one which is per-

(*s*) Forman *v.* Homfray, 2 Ves. & B. 329; Waters *v.* Taylor, 15 Ves. 10; Loscombe *v.* Russell, 4 Sim. 8; Knebell *v.* White, 2 Younge & C. Exch. 15. These last two cases have been supposed to overrule the doctrine of Sir John Leach in Harrison *v.* Armitage, 4 Madd. 143, and Richards *v.* Davies, 2 Russ. & M. 347; Camblat *v.* Tupery, 2 La. Ann. 10. One partner cannot demand an account in respect of particular items, and a division of particular parts of the property; but the account must necessarily embrace everything. Baird *v.* Baird, 1 Dev. & B. 524; McRae *v.* McKenzie, 2 Dev. & B. 232.

(*t*) In Forman *v.* Homfray, 2 Ves. & B. 330, Lord Eldon placed the reason of the rule upon the ground of convenience, saying: "If a partner can come here for an account merely, pending the partnership, there seems to be nothing to prevent his coming annually." This objection was met by Sir John Leach, Master of the Rolls, in Richards *v.* Davies, 2 Russ. & M. 347, as follows: "It is objected that, if such a suit be entertained, the defendant may be vexed by a new bill whenever new profits accrue; but what right has the defendant to complain of such new bill if he repeats the injustice of withholding what is due to the plaintiff? Would not the same objection lie in a suit for tithes, which accrue *de anno in annum?*" In Knebell *v.* White, 2 Younge & C. Exch. 21, Alderson, B., remarking upon this point, said: "Then what is the principle? It seems this, that where there is an open account, in which the antecedent items, respecting which the account in equity is sought to be taken, are necessarily connected with, and not capable of being severed from, the other items of the account which are to arise in future, the court will not interpose; for, if it did, it would tolerate the bringing of a suit which could never come to an end till the account itself was closed, for the state of the account would be continually changing whilst it was under discussion and settlement. The party who seeks redress must put it in the power of the court to close finally, by its decree, the dispute between the parties. As soon as he does this, he is entitled to its assistance. In the case of a partnership, therefore, he must pray a dissolution."

of equity. Thus one partner may be enjoined from depriving another of a share in the direction of the business, Tillar *v.* Cook, 77 Va. 477; as by denying him access to the books, or other information about the business. Katz *v.* Brewington, 71 Md. 79, 20 Atl. 139. And where it is necessary in order to secure certain property rights to the complainant, specific performance to that extent may be decreed even of an agreement to form a partnership at will. Somerby *v.* Buntin, 118 Mass. 279.

fectly open to the discretion of the court, and the rule, if there be a rule, goes no farther than the reason of it.

§ 207. **Account without Dissolution.**—If a partner prays for an account, and his case shows that he has need of one, that it is his only effectual remedy, and that he cannot get it without the aid of the court, but shows also that, as soon as an account is rendered, no sufficient cause of dissolution will remain, and circumstances from which the court could infer that a continuance of the partnership desired by both would be neither injurious nor useless,—in such a case, we know not why a decree for an account should not be rendered; and we have no doubt that it would be by most of our courts, if not by all. (*u*)

In England, an account has been decreed upon a bill praying for the establishment of the partnership. (*y*)

A prayer for dissolution is often made, and the power of equity to grant it for good cause is doubted by no one. This subject,

(*u*) Perhaps it may now be said that there is no general, or, at least, no universal, rule, to the effect that equity will not decree an account between partners, unless there be dissolution, or a prayer for it. The cases before Lord Eldon, *supra*, § 206, note (*t*), in which he affirmed the existence of such a rule, may perhaps, be deemed to have turned, in a great measure, upon their own particular circumstances. In Harrison *v.* Armitage, 4 Madd. 143, and Richards *v.* Davies, 2 Russ. & M. 347, Sir John Leach expressly rules, that though the court could not *carry* on a partnership, except with a view to dissolution, yet it might and would, if justice so required and the petitioning partner had no other remedy, decree an account of the past partnership transactions, though there was no dissolution, actual or prayed for. A different principle governed the decision of the court in Loscombe *v.* Russell, 4 Sim. 8, and was approved in Knebell *v.* White, 2 Younge & C. Exch. 15, in both of which cases the opinion attributed to Lord Eldon was followed, as being the sounder and the better established. But the English cases strongly incline in favor of the opinion of Sir John Leach, and this may now be considered as the received doctrine. In Wallworth *v.* Holt, 4 Mylne & C. 619, 635, 639, Lord Chancellor Cottenham, speaking of the two supposed rules,—"the one binding the court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it,"—says: "The result of these two rules would be that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties; which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. If that were the rule of the court,—if a bill, in no case, would lie to compel a man to observe the covenants of a partnership deed,—it is obvious that a person fraudulently inclined might, of his mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract." See farther Bentley *v.* Bates, 4 Jur. 552; Hills *v.* Nash, 10 Jur. 148; Walburn *v.* Ingilby, 2 Mylne & K. 61, 76.

In Pennsylvania it has been decided that a court of equity will entertain a bill for an account by one partner against the other, although the bill does not contemplate a dissolution of the partnership. Hudson *v.* Barrett, 1 Pars. Sel. Cas. 414. See Pirtle *v.* Penn, 3 Dana, 240, 248.

(*y*) Knowles *v.* Haughton, 11 Ves. 168.

however, has not only a special importance, but some peculiar difficulties; and we propose to treat of Dissolution by Decree — its causes, methods, and consequences — by itself.

So, too, equity is often called upon to decree a sale of the partnership property; but, as this would itself amount to a dissolution, or at least arrest the business of the partnership for the time being, and would be an exertion of the power of equity which could never be called for unless where there was or should be a dissolution, we shall consider this subject in connection with that of the dissolution of partnership; not, however, altogether in the chapter on dissolution by process of law; for a sale may also be decreed where the dissolution is by expiration of a limited period by agreement of the partners, or by the death of one or more of them.

§ 208. **Account how Settled.** — Perhaps the aid of equity is not invoked in any cases in which it is more indispensable, or more useful, than when it is asked to settle the accounts between the partners. And it may be well to say something of the principles by which it will be guided in making such settlement.

In the first place, it is perfectly competent for the partners to agree, at their own pleasure, how the accounts shall be settled; and if such agreements are entered into in good faith by all the parties, and are not in themselves oppressive and injurious, they will be carefully respected. (*z*) And not only will equity thus regard express agreements how to settle, but will draw from the words, or from the acts of the parties, considered in connection with all the circumstances, whatever inference or information it can as to their original or subsequent intention and understanding, and will, on the same condition that this method be honest and not-injurious, carry it into effect. Thus, if there have been many settlements, or even one, previously made between the partners, if this be not now objected to by either of them for good cause, and be not itself obviously and considerably objectionable, the court will be disposed to adopt this as an example and precedent, and direct the future accounts to be made up on the same principle. (*a*)

(*z*) Jackson *v.* Sedgwick, 1 Swanst. 460. And this remains true, though the articles containing the provision respecting the mode of taking the accounts be not actually executed by the parties. As where articles were entered into for a partnership, and, two of the partners being esquire beadles of the University of Cambridge, it was agreed to conceal the partnership from the University, and therefore that the articles should not be executed. Lord Cowper decreed an account of the partnership according to the terms of the draft of the articles, so far as the same were reduced to a certainty. Worts *v.* Pern, 3 Bro. P. C. 558.

(*a*) Jackson *v.* Sedgwick, 1 Swanst. 460, 469; Pettyt *v.* Janeson, 6 Madd. 146; *ante*, §§ 164, 167, and notes.

If it be necessary, equity will, on sufficient proof, compel the production of concealed articles, or agreements as to the method or principles of accounting; or, if they are ascertained, but cannot be produced, will order an account to be taken in conformity with them. The topic of "account" has, however, so much extent and importance in the law of partnership, that we propose to consider it in a chapter by itself.

If a partner files a bill in equity against his copartners, after the termination of the copartnership, it has been held that all the parties are to be regarded as actors; and the decree should settle the partnership concerns between all the partners, as if each had filed a bill against his copartners. (*nn*)

It may be regarded as a general rule, that a bill in equity by a partner for a balance must show a final settlement of the partnership affairs, or ask the court to make such a settlement. (*nnn*)

When there is a prayer to restrain a partner from acting as a partner until an account and settlement, and also for this account and settlement, and the affidavit filed by the defendant asserts (without contradiction) that the plaintiff has possession of the partnership books, and that the defendant is, for this cause, unable to render a true account, or to put in a full answer, it seems that the bill will be dismissed, although improper conduct on the part of the defendant be not denied. (*i*)

§ 209. **Decree for Injunction.** — There is nothing in the practice or principles of equity as to the enforcement of specific rights strictly peculiar to cases of partnership. The essentials to give equity jurisdiction are three: There must be a contract, which may be express or implied, but must be valid at law; there must be an infringement of this contract which is not technical merely, but material and substantial; and the remedy at law must be inadequate. In such cases a court of equity will frame its remedy so as to make it in the greatest degree complete and effectual; and this may be in a positive form, by decree of specific performance, or in a negative form, by injunction. The for-

(*nn*) Raymond *v.* Carne, 45 N. H. 201.

(*nnn*) Williamson *v.* Haycock, 11 Iowa, 40.

(*i*) Littlewood *v.* Caldwell, 11 Price, 97. But where the bill calls for a discovery which the defendant cannot make completely without seeing the partnership books and accounts, which are not in his possession, but which he believes to be in the hands of the plaintiff, he must put in an answer stating to that effect, and then move the court to stay proceedings against him for not putting in his full answer, until he has been assisted with that inspection. It seems, that, in such cases, a motion by the defendant for the production of the books and accounts, *before answer*, will be refused. Pickering *v.* Rugby, 18 Ves. 484. See Kelly *v.* Eckford, 5 Paige, 548, 550; 3 Daniell Ch. Pr. (Perkins' ed.) 2071, 2072.

mer having been somewhat considered, we will now treat of the latter.[1]

Injunction is one of the most stringent measures, as well as one of the most efficacious remedies, within the practice or power of equity. It is never made use of on slight or merely temporary grounds. (*b*) The reasons against interfering between married parties are regarded — not only in the civil law, to which we have already referred, but at common law — as having some application to partnerships. (*c*) Mere failure or infirmity of temper, disputes, which, however vexatious, are not positively injurious, or other similar troublesome but tolerable grievances, will not induce equity to apply this remedy. Nor will injunction issue where there is reason to believe that it will not be efficacious and entirely remedial; nor in case it will probably inflict an extreme inconvenience, or other mischief, beyond what the character or exigency of the case calls for or justifies. (*d*)

It is said that equity will not interfere, by injunction, where there is only a single breach of a covenant, actual or threatened, or but one or two; and not unless there are many or a series of similar wrong-doings, such as would amount to a course of bad and injurious conduct. (*e*) This may be a rule which would operate as far as the reason of it goes; which is, that for such single breaches the injured party may be left to his remedy at law, while the proper course, in a case of continued bad conduct, is to put a stop to it. But there can be no arbitrary rule that equity will not interfere, by injunction, in a case of a single

(*b*) Goodman *v.* Whitcomb, 1 Jac. & W. 592 ; Marshall *v.* Colman, 2 Jac. & W. 266 ; Wray *v.* Hutchinson, 2 Mylne & K. 235 ; Henn *v.* Walsh, 2 Edw. Ch. 129.

(*c*) Goodman *v.* Whitcomb, 1 Jac. & W. 592.

(*d*) Smith *v.* Fromont, 2 Swanst. 330.

(*e*) Marshall *v.* Colman, 2 Jac. & W. 266.

[1] *Injunction.* One partner, without asking for a dissolution, may in an exceptional case secure the aid of equity to prevent his copartner from doing him a wrong. Thus a partner may be enjoined from carrying on another business, contrary to the provisions of the articles. Levine *v.* Michel, 35 La. Ann. 1121. So a partner may be enjoined from excluding his copartner from the business. Anonymous, 2 K. & J. 441 ; Rutland Marble Co. *v.* Ripley, 10 Wall. 339.

Upon dissolution, a partner may have an injunction pending the account to prevent any disposition of the assets by his copartner which would cause irreparable loss. Wilkinson *v.* Tilden, 9 F. R. 683. Or to prevent any fraudulent or mischievous dealing with the property. Shannon *v.* Wright, 60 Md. 520. So a surviving partner may be enjoined from so dealing with the assets as to waste them, especially if he is insolvent. Fletcher *v.* Vandusen, 52 Ia. 448 ; Gable *v.* Williams, 59 Md. 46 ; Jennings *v.* Chandler, 10 Wis. 21. So upon dissolution one partner may be enjoined from advertising a discontinuance of the business (*ante*, § 181), or from using the old firm name in such a way as to hold out his former copartner as still a partner (*ante*, § 182).

breach, if, in other respects, the conduct of the defendant calls for, and is suited to, equitable relief.

§ 210. **May issue without Dissolution.** — A question has arisen, somewhat analogous to one we had occasion to consider in reference to a prayer for account, which is, whether injunction will be decreed where dissolution is not decreed, or is not asked for. Our general answer would be the same. But it seems to be much more clearly determined, that neither dissolution nor a prayer for it is a necessary foundation for injunction, than that they are not necessary for an account. (*f*)

It is undoubtedly true, that so extreme a remedy as that of injunction — which entirely arrests the proceedings of the person against whom it is aimed, and utterly disables him as to the subject-matter of it — would seldom issue, unless it were made necessary by a grievance which would suffice for a decree of dissolution, if that were called for, or seemed to be the proper remedy. But not only does this decree issue without dissolution, but its propriety was not questioned, even in a case where the prayer of the bill was for the protection and preservation of the partnership, of which the defendant threatened dissolution. (*g*)

§ 211. **Injunction to restrain Misconduct of Partner.** — The cases are numerous and varied where injunction has been sought and granted to restrain a partner from making an improper use of the partnership property, credit, or name. This may be by vio-

(*f*) In Marshall *v.* Colman, 2 Jac. & W. 266, it seems to have been questioned by Lord Eldon whether equity would interfere between partners by injunction, unless there was ground for, and the bill prayed a dissolution of, the partnership. But in Charlton *v.* Poulter, 19 Ves. 148, note, where the partnership was for an unexpired term, the court restrained the gross personal misconduct of one partner, though there was no prayer for a dissolution before the expiration of the term. The principle of this last case seems to be supported by the opinion of Lord Eldon in Goodman *v.* Whitcomb, 1 Jac. & W. 592. And in Mills *v.* Thomas, 9 Sim. 609, Sir L. Shadwell, V. C., said: "I am of opinion that the court ought to interfere between copartners, whenever the act complained of is one that tends to the destruction of the partnership property, notwithstanding a dissolution of the partnership may not be prayed." See Anderson *v.* Wallace, 2 Molloy, 540; Natusch *v.* Irving, Gow on Part. App. 398, 406; Cooper, 358; Loscombe *v.* Russell, 4 Sim. 11; Henn *v.* Walsh, 2 Edw. Ch. 129; Glassington *v.* Thwaites, 1 Sim. & S. 124, 130, note.

(*g*) An application was made, some years ago, to the court of chancery, for an injunction to inhibit the defendants from dissolving a commercial partnership; the other side proposed to defer it, as not having had time to answer the affidavits; but it was insisted, that this was in the nature of an injunction to stay waste, and that irreparable damage might ensue. At length the court deferred it, the defendants undertaking not to do anything prejudicial in the mean time. But no doubt arose concerning the general propriety of such an application. Chavany *v.* Van Sommer, cited in 3 Wood. Lec. 416, n., 1 Swanst. 512, n.

lation of partnership articles, or a breach of a duty imposed by law, or a wrongful act forbidden by law. Thus, if a partner becomes grossly intemperate, or involves the partnership foolishly in debt, or wastes its resources, (*h*) or becomes insolvent, (*i*) or obstructs or embarrasses or lessens the partnership business, (*j*) or misapplies its property, (*k*) or in any way injurious to the partnership grossly misconducts, (*l*)—equity will not only restrain him from the particular wrongful acts complained of, but, more generally, from using the name of the firm on any negotiable paper, or from contracting any debt for the partnership, or receiving any payment. (*m*) But a disability so general as this would amount to a dissolution of the partnership, and that would in most cases be preferred as the most complete and adequate remedy.

It has even been intimated that equity would interfere in this way if a partner should put himself in a position which lays him under a strong temptation to interfere with the interests or damage the business of the firm. (*n*) Nor do we see any reason why, in a case of this kind, of sufficient magnitude, the court should refuse its interference until something had been done to show that the temptation had been yielded to and wrong actually inflicted.

§ 212. **Injunction after Dissolution.**—If a partnership have been dissolved, and either of the partners attempt to carry on the former business for their own benefit, and in a way injurious to the former partners, the injured partners may have an injunction. (*o*) [1] So, if an account has been finally settled between the partners, and one or more of the partners has undertaken to pay all the outstanding debts, or certain specified debts, and to indemnify the other partner, if he be compelled to pay any of these debts, and this other partner, being obliged to pay them or any of them, should obtain and retain money which, by the contract of settle-

(*h*) Mills *v.* Thomas, 9 Sim. 606, 609; Gratz *v.* Bayard, 11 S. & R. 41, 48.

(*i*) Lawson *v.* Morgan, 1 Price, 303.

(*j*) Charlton *v.* Poulter, 19 Ves. 148, n.

(*k*) Williams *v.* Bingley, 2 Vern. 278, note; Master *v.* Kirton, 3 Ves. 74.

(*l*) Glassington *v.* Thwaites, 1 Sim. & S. 124; Hood *v.* Aston, 1 Russ. 412. As, if a partner removes the partnership books from the place of business of the firm, he will be restrained by injunction from keeping them at any other place. Greatrix *v.* Greatrix, 1 De G. & S. 692.

(*m*) The usual form of the order for an injunction against a partner, is, "that an injunction be awarded against, &c., from entering into any contract or contracts, and from accepting, &c., any bills, &c., *in the name of the copartnership*, &c." Seton's Decrees, 308. See Williams *v.* Bingley, 2 Vern. 278, note.

(*n*) Glassington *v.* Thwaites, 1 Sim. & S. 133. See Burton *v.* Wookey, 6 Madd. 367.

(*o*) De Tastet *v.* Bordenave, Jacobs, 516. [*Ante*, § 182, note.]

[1] See Wilkinson *v.* Tilden, 9 F. R. 683.

ment belongs to the indemnifying partners, they might bring an action at law for the money so retained. If, however, the settlement and agreement of indemnification could not be used as a defence, or by way of estoppel or set-off or otherwise, equity would interfere and decree an injunction against these proceedings at law. (*p*) Generally, as we have already seen, courts of law would refuse jurisdiction of a question of partnership, where they could not give adequate remedy. And in this country, the more liberal practice of courts of law, and the marked approach of equity and law towards each other, would render unnecessary, perhaps always, such an exercise of the powers of equity. Still, it is clearly within the *system* of equity jurisdiction and action, and the authorities show that this remedy has been applied. (*q*)

§ 213. **To restrain carrying on of Business.** — If, upon settlement, it is agreed that one or more of the partners shall not exercise or carry on a certain trade within certain limits, and a valuable consideration, either by other agreements, or in any way, is given for this; or if on submission to arbitrators of the affairs of a partnership for final settlement, an award is made to the same effect, and the partner so inhibited does set up or exercise that trade or business, in violation of the agreement or award, — injunction would issue against him. (*r*) And this has been granted where the inhibition did not appear expressly in the award, but it was proved that the award was made on that basis. (*s*)

So too, if, during a partnership, a partner establishes and carries on a business adverse and injurious to that of the partnership, which, as we have seen, the law forbids him to do, — or even threatens and prepares to do this, — he will be restrained by injunction. (*t*)

§ 214. **To restrain wrongful use of Trade Name.** — So if a partner use the name of the firm in any wrongful way, he will be

(*p*) Gold *v.* Canham, 1 Cas. Ch. 311, 2 Swanst. 325. Where, on the dissolution of a copartnership between D. & F., D. agreed with F. that F. should take all the stock and effects, and pay all the debts due by the firm, and afterwards F. became insolvent and threatened to dispose of all the partnership property and appropriate the same to his own individual use, leaving the debts unpaid; upon a bill filed for that purpose, an injunction was granted restraining F. from disposing of the partnership property in a different manner from that stipulated in his agreement with D. Devau *v.* Fowler, 2 Paige, 400.

(*q*) See preceding note.

(*r*) Williams *v.* Williams, 2 Swanst. 253, 1 Wilson Ch. 473, n.; Harrison *v.* Gardner, 2 Madd. 198; *ante,* § 181 and note

(*s*) Harrison *v.* Gardner, *supra.*

(*t*) See Burton *v.* Wookey, 6 Madd. 367; Coates *v.* Coates, 6 Madd. 287; Long *v.* Majestre, 1 Johns. Ch. 305; *ante,* § 150, *et seq.*, and notes; § 211, note (*n*).

restrained. (*u*) And it is intimated that injunction will issue, if he signs the instruments of the firm with a name which purports to be the name of the firm, but is not so in fact or by the agreement of the partners. (*v*)

§ 215. **Injunction against or for Surviving Partner.** — Causes for injunction sometimes arise where one of the partners has deceased. We shall presently see that this event always makes, strictly speaking, a dissolution; but it may leave certain rights behind it which will be protected by injunction. Thus, any misapplication of the partnership funds by the surviving partner will be prevented by injunction. (*w*) But there must be sufficient evidence of the fact, or of imminent danger; for a mere apprehension that the surviving partner may abuse his powers will not induce a court to restrain and embarrass him in the exercise of these powers. (*x*) Where the representatives of the deceased do, or propose to do, a wrong to the surviving partners, the latter may have their remedy by injunction. As, if the deceased held a lease, or other real chattel or real estate, in his own name, but actually as partnership property and for the partnership, and his executors propose to hold or apply this as the private assets of the deceased, they will be restrained by injunction. (*y*)

§ 216. **Injunction against Third Persons.** — As partners who suffer from misconduct of their copartners may have injunction against them, so they may against third parties who are participant with the partners in the wrong-doing. Thus, if a partner, in fraud of the firm, makes or accepts or indorses negotiable paper with the name of the firm, but for his own use, injunction against negotiating or using the same will issue against a third party in possession of the note, unless he came into possession of it for value, and in ignorance of its fraudulent origin. (*z*)

Where a note was made by one who had been a partner of the firm until its dissolution, and who signed it with the name of the firm, it was doubted whether injunction should issue against

(*u*) As if he accept or negotiate bills of exchange, in the partnership name, but not for partnership purposes. *Ante*, § 211, cases cited in note (*k*); *post*, note (*z*).

(*v*) Marshall *v.* Colman, 2 Jac. & W. 266.

(*w*) Hartz *v.* Schrader, 8 Ves. 317. Thus, upon motion by the representatives of a deceased partner, the surviving partner will be restrained from bringing ejectment upon his title, as surviving lessee of the partnership premises. Elliot *v.* Brown, 3 Swanst. 489, n.

(*x*) Woodward *v.* Schatzell, 3 Johns. Ch. 412; Walker *v.* Trott, 4 Edw. Ch. 38. As to the rights and powers of surviving partners generally, see *ost.*

(*y*) Alder *v.* Fouracre, 3 Swanst. 489.

(*z*) Hood *v.* Aston, 1 Russ. 412, 415; Jervis *v.* White, 7 Ves. 413. See Master *v.* Kirtan, 3 Ves. 74; Collyer on Part. § 340, note (1); Newman *v.* Milner, 2 Ves. 483

the holder, because he could make no use of the note at law; it being, in fact, a note without a signature. (a) But the better doctrine undoubtedly is, that the use of the partnership name after its dissolution will be prohibited by injunction, because it may not only expose the former partners to a suit at law, but, if they should have been remiss in giving notice of their dissolution, it might, under some circumstances, bind them to the payment of the paper in the hands of an innocent holder for value. (b)

We shall hereafter consider, in a separate chapter, the manner in which the creditors of the firm and of the separate partners may obtain from the property of the firm or of the separate partners the security or payment to which they are entitled. The subject is one of much difficulty as well as importance. We will not anticipate it here so far as to inquire what rights of attachment or levy a separate creditor has on the property of the firm, or on the interest of the separate partner who is his debtor, in that property. We will say, only, that if such creditor proceeds, or proposes to proceed, to an interference with the property of the firm, — whether by attachment or levy, — to which he has no legal

(a) Ryan v. Mackmath, 3 Bro. C. C. 15.

(b) As far as Ryan v. Mackmath, *supra*, can be regarded as authority for the rule that equity will not restrain the improper use of the partnership name by one of the partners after dissolution, it is no longer law. Lord Chancellor Thurlow there decided that he would not order an instrument to be delivered up and the name to be erased, upon which an action could not be maintained at law. Upon the same principle, it has been said that equity would not restrain by injunction the use of the partnership name after dissolution. But the doctrine of Lord Thurlow in Ryan v. Mackmath has since been overruled. It is now clearly settled that courts of equity have jurisdiction to order an instrument to be delivered up and cancelled, notwithstanding it be void at law, and, perhaps, even though its nullity be apparent on its face, wherever the circumstances of the individual case render such interference expedient. See Ryan v. Mackmath, 3 Bro. C. C. 15 (Perkins' ed.), and notes, Hamilton v. Cummings, 1 Johns. Ch. 517, 520; Grover v. Hugell, 3 Russ. 432; Hodgson v. Murray, 2 Sim. 515, 3 Sim. 382; Simpson v. Howden, 3 Mylne & C. 97, 104; Peirsole v. Elliott, 6 Pet. 95; Duncan v. Worrall, 10 Price, 31; Thompson v. Graham, 1 Paige, 384; Pettit v. Shepherd, 5 Paige, 493; Torrey v. Buck, 1 Green Ch. 366; Jones v. Perry, 10 Yerg. 59; Maise v. Garner, Mart. & Y. 383; Garrett v. Miss. & Ala. R. Co., 1 Freem. Ch. 70; Sessions v. Jones, 6 How. (Miss.) 123; Leigh v. Everhart, 4 T. B. Mon. 379, 380; 2 Story Eq. §§ 698-702; 1 Madd. Ch. 301.

The authority of Ryan v. Mackmath not being valid to prevent courts of equity from restraining the use of a partnership name after dissolution, there would seem to be no reason why they should not do this, but, on the other hand, as suggested in the text, strong reason why they should. In Webster v. Webster, 3 Swanst. 490, n., an injunction to restrain surviving partners from using the name of a deceased partner, in the firm of the trade, was refused. Possibly this case was decided upon the ground that the right to retain the partnership name, considered as an interest of the nature of good-will, survived to the remaining partners. See Lewis v. Langdon, 7 Sim. 421.

right, it would seem to be clear that the firm, and, perhaps, that the joint creditors of the firm, may have such interference restrained by injunction. (*c*)

(*c*) A court of law will not interfere and compel the creditor of one partner to delay satisfying his execution out of the partnership effects till an account can be taken and the debtor partner's interest ascertained. Parker *v.* Pistor, 3 B. & P. 288; Chapman *v.* Koops, 3 B. & P. 289. But in these very cases it is intimated that relief may be had, by the debtor's partners, or the partnership creditors, by bill in equity. And the true conclusion to be drawn from a view of the English authorities is, that a separate creditor to whom execution has issued for the debt of one partner will be restrained from taking the partnership effects thereon until an account has been taken, and his debtor's interest, which is alone properly subject to the execution, ascertained. Eden on Inj. 31. See Skipp *v.* Harwood, 2 Swanst. 586, 587; Lowndes *v.* Taylor, 1 Madd. 423. Such an injunction will be granted at the suit of the surviving partner, Newell *v.* Townsend, 6 Sim. 419; or of the joint assignees in bankruptcy of the firm, Taylor *v.* Field, 15 Ves. 559; Bevan *v.* Lewis, 1 Sim. 376; Anon., 2 Ca. Ch. 38; and, upon the same principle, the property of the partnership will be protected in equity, whether the proposed interference proceed from assignees for value of one partner's interest from his assignees in bankruptcy, or from his executors or administrators. Taylor *v.* Fields, 4 Ves. 396; 15 Ves. 559; Barker *v.* Goodair, 11 Ves. 85; Dutton *v.* Morrison, 17 Ves. 206–209. And, it seems, that, if, in cases of this nature, execution be satisfied before injunction can be obtained, the court may interfere, and stay the money in the hands of the sheriff; whom the plaintiff should properly make a party by supplemental bill, if the money has come into his hands since the injunction issued, or by the original bill, if the money was in his hands at the time. Franklin *v.* Thomas, 3 Meriv. 225, 234; Hawkshaw *v.* Parkins, 2 Swanst. 549. See Axe *v.* Clarke, 2 Dick. 549. After judgment at law against a firm for a debt, a court of equity will not, it seems, at the instance of one partner, grant an injunction to stay execution on the ground that he had retired from the partnership long before the debt was incurred, and that the plaintiff at law was apprised of it; because such circumstances would constitute a good legal defence. Protheroe *v.* Forman, 2 Swanst. 227.

What we have already stated as the doctrine of the English cases, namely, that equity will, by injunction, restrain the judgment creditor of a single partner from satisfying his execution out of the partnership effects, and will compel him to wait till an account has been taken, and the interest of the debtor partner in the joint property definitely ascertained, — has been laid down as the rule very generally by the English text-writers. See 1 Madd. Ch. 132, 189; Gow on Part. [144]; Collyer on Part. § 831 (Perkins' ed.); Eden on Inj. 31. In opposition to this conclusion, however, we have high authority in this country. In Moody *v.* Payne, 2 Johns. Ch. 548, the precise point came before Chancellor Kent, and was decided contrary to the rule we have above supposed to be deducible from the English cases. Judge Story's opinion, on the other hand, is in consonance with the doctrine of the text. Story on Part. § 264. And Chancellor Kent himself, while maintaining that Moody *v.* Payne is in accordance with the weight of authority, seems to intimate that, in his own opinion, the contrary doctrine is founded on the better reason. In 3 Kent Comm. [65], note, he says, after referring to Moody *v.* Payne and Judge Story's comments thereon: "As I have already observed, the more fit and suitable rule of practice would seem to be, to have the adjustment of the partnership account precede the sale. But the current of authorities, as I read them, is the other way, and they are emphatically so in New York." See, in support of this last remark, Phillips *v.* Cook, 24 Wend. 398, 408; Matter of Smith, 16 Johns. 106, note; Hergman *v.* Dettlebach, 11 How. Pr. 46. The decision in Moody *v.* Payne

§ 217. **Preliminary Injunction.** — How injunction may be obtained can be ascertained only by a consideration of the processes and practice of equity, which is a topic by itself. It may, however, be proper to remark, in this connection, that, usually, injunction is not issued until after the defendant has answered, or has had a sufficient opportunity to answer. (*d*) The reason is obvious: the court would not apply so stringent a measure on a mere *ex parte* statement or evidence. But it is also obvious that there may be cases — in partnership as well as elsewhere — in which an injunction must be granted at once, in order to be of any use, and where, of course, delay would be the same thing as refusal. On this point the English cases rest, or at least suggest, a distinction which is somewhat technical. If the act which is complained of is waste, or distinctly in the nature of waste, injunction will issue at once, on a bill and affidavits, if they satisfy the courts that there is sufficient cause. (*e*) But if there be no waste, then there must be delay until an answer is filed. (*f*) We doubt whether this rule has much force, or frequency of application, in

was also approved and followed in Sitler *v.* Walker, 1 Freem. Ch. 77. See Church *v.* Knox, 2 Conn. 514, 524; Brewster *v.* Hammet, 4 Conn. 540; Witter *v.* Richards, 10 Conn. 37, 43. See the opinions of Parker, C. J., in Morrison *v.* Blodgett, 8 N. H. 252, 253, and Dow *v.* Sayward, 14 N. H. 9, 13. See also Hill *v.* Wiggin, 21 N. H. 292.

On the other hand, it was distinctly held, in Place *v.* Sweetzer, 16 Ohio, 142, that while partnership goods may be levied upon under execution against one of the partners, for his separate debt, the sale in such case may be restrained by injunction till the interest of the partner is ascertained. And in Cammack *v.* Johnson, 1 Green, Ch. 163, the court intimated its opinion to be to the same effect, though it was not considered necessary to decide the question. So also in White *v.* Woodward, 8 B. Mon. 484. See further Moore *v.* Sample, 3 Ala. 319, 320.

The above are the principal *direct* authorities upon the point under discussion. In none of them, perhaps, is the general principle upon which the question turns thoroughly investigated; and it is evident that the answer to the question must depend upon the right of control over the partnership effects which the creditor of a single partner acquires by a judgment and execution against him. We shall, therefore, refer to this subject again when we come to speak of the remedies of the creditors of individual partners.

(*d*) Anonymous, 1 Ves. 476; Lawson *v.* Morgan, 1 Price, 303; Adams Eq. (Am. ed.) [355–357]; 3 Daniell's Ch. Pr. (Perkins' ed.) 1886; Hartridge *v.* Rockwell, R. M. Charlt. 264; Ogden *v.* Kip, 6 Johns. Ch. 160, 161.

(*e*) As in case of the insolvency of the active partner, who continues to make contracts in the name of the partnership. Lawson *v.* Morgan, 1 Price, 303. See Peacock *v.* Peacock, 16 Ves. 51; Hartz *v.* Schrader, 8 Ves. 317; Chavany *v.* Van Sommer, M. T. 10 Geo. 3, 3 Wood. Lec. 416, n., 1 Swanst. 512, n.; Read *v.* Bowers, 4 Bro. 441; Collyer on Part. (Perkins' ed.) § 349, note.

(*f*) "It is a great mistake, and one very commonly made, to imagine that all the numerous cases wherein very much inconvenience, and even loss, may be suffered, by consequence of the acts sought to be restrained, are, *therefore*, in the nature of waste." *Per curiam*, Cofton *v.* Horner, 5 Price, 537. See also Littlewood *v.* Caldwell, 11 Price, 97, and Hilton *v.* Granville, 4 Beav. 130.

England, and we think it would have little or none here. Unless, indeed, it should be construed as merely a compendious way of stating the true rule; which must be, that equity will not issue an injunction, unless all the case is in and both sides have been heard; or unless there is enough of statement and evidence before the court to convince them that immediate remedy is demanded, and there is no apparent probability of its working undue mischief. (*g*) In such case, a temporary or preliminary injunction will issue, precisely on the same grounds and in the same way as in cases not of partnership. And this temporary or preliminary injunction will be made only extensive enough to avert immediate and impending danger, and will afterwards be dissolved or modified or made absolute, as shall seem to be proper upon a hearing of the whole case. (*h*)

§ 218. **Decree for a Receiver.** — If an injunction arrests all proceedings on the part of a partner, the appointment of a receiver actually ousts him from all possession and control.[1]

(*g*) See 2 Story Eq. §§ 959 *a*, 959 *b*, and Adams Eq. 357, as to the discretion which courts of equity always exercise in the issuing of injunctions, and the care with which the right of all parties will be protected.

(*h*) A special injunction being usually granted till answer *or* further order (Seton's Decrees, 305, 306; Eden on Inj. 325), a defendant may apply to have it dissolved, not only upon putting in his answer, but upon affidavit before answer. 1 Newl. Ch. Pr. 226; 3 Daniell, Ch. Pr. (Perkins' ed.) 1894, 1895. And notwithstanding the general rule, that to obtain or continue an injunction, affidavits cannot be received, in contradiction to assertions positively made by the answer (Eden on Inj. 108, 326; 3 Daniell, Ch. Pr. (Perkins' ed.) 1827, 1883, 1884), yet there being no question of title between the parties (id.; 1 Newl. Ch. Pr. 227; Adams Eq. 356), in cases of waste, and of misconduct of parties analogous to waste, affidavits filed *prior* to the answer may be read against it, as to facts of waste or mismanagement, though it is otherwise as to affidavits filed after the answer. Id.; Smythe *v.* Smythe, 1 Swanst. 252, 254, n.; Norway *v.* Rowe, 19 Ves. 144; Charlton *v.* Poulter, 19 Ves. 148; Peacock *v.* Peacock, 16 Ves. 49, 51; Lawson *v.* Morgan, 1 Price, 303; Eastburn *v.* Kirk, 1 Johns. Ch. 444. See Roberts *v.* Anderson, 2 Johns. Ch. 202; Poor *v.* Carleton, 3 Sumn. 81, 82; Smith *v.* Cummings, 2 Pars. Sel. Eq. Cas. 92; Lessig *v.* Langton, Bright. N. P. 191; Renton *v.* Chaplain, 1 Stock. 62. In case of imminent danger of injury to a complainant partner, the court may, after appearance, allow a temporary injunction to issue upon proposed amendments to the bill, granting, at the same time, an order to show cause why the bill should not be so amended, and the injunction continued. Hayes *v.* Heyer, 4 Sandf. Ch. 485. Where both an injunction and a receiver are sought, as in some cases, the injunction may be granted, but the receiver refused. Hartz *v.* Schrader, 8 Ves. 317. The application for the injunction, and the appointment of a receiver, should be made the subject of two successive motions. Lawson *v.* Morgan, 1 Price, 303.

[1] *Receiver.* — A court of equity in the proper case has power to appoint a receiver of partnership property. Cox *v.* Volkert, 86 Mo. 505. He does not get legal title to the property, but only right of possession and of disposition. Keeney *v.* Home Ins. Co., 71 N. Y. 396. If it is necessary to bring an action upon a firm claim, the receiver is

This is, therefore, even a more stringent measure than the former. And if a partner prays that a receiver may be appointed, or that some person be authorized, to manage the concern and act as a *quasi* receiver, the rule that the prayer will not be granted, unless the case entitle the plaintiff to a dissolution, seems to be quite well settled as a rule of practice. (*j*)

(*j*) Goodman *v.* Whitcomb, 1 Jac. & W. 589; Oliver *v.* Hamilton, 2 Anst. 453; Waters *v.* Taylor, 15 Ves. 10; Harrison *v.* Armitage, 4 Madd. 143; Richards *v.* Davies, 2 Russ. & M. 347; Smith *v.* Jayes, 4 Beav. 503; Henn *v.* Walsh, 2 Edw. Ch. 129; Garretson *v.* Weaver, 3 Edw. Ch. 385; Roberts *v.* Eberhardt, 1 Kay. 148; Walker *v.* House, 4 Md. Ch. 39; Birdsall *v.* Colie, 2 Stock. 63; 1 Barb. Ch. Pr. 662.

to bring it in his own name. Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132; Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539, 7 Atl. 647.

During the continuance of the partnership, one partner may ask for a receiver (always, it would seem, as ancillary to a dissolution) in case the copartner's conduct is fraudulent, or in some other way threatens to injure complainant's interest in the business. Barnes *v.* Jones, 91 Ind. 161; Shannon *v.* Wright, 60 Md. 520. Such is the case where the defendant is alleged to be insolvent and wasting the assets, Phillips *v.* Trezevant, 67 N. C. 370; or deliberately breaking up the business, Sutro *v.* Wagner, 23 N. J. Eq. 388, 24 N. J. Eq. 589. Mere dispute or ill-feeling between the partners is not sufficient ground for a receiver, Loomis *v.* McKenzie, 31 Ia. 425. Nor is the fact that a dissolution will be decreed enough to secure the appointment of a receiver. It is necessary also to show that there are disputes as to the disposition of the property, and conflicting claims by the partners. Bufkin *v.* Boyce, 104 Ind. 53; Whitman *v.* Robinson, 21 Md. 30; Wilson *v* Fitchter, 3 Stoct. 71; Richards *v.* Baurman, 65 N. C. 162. In New York, however, it would seem that a receiver will be appointed as of course if the circumstances justify a decree for dissolution. Marten *v.* Van Schaick, 4 Paige, 479; McElvey *v.* Lewis, 76 N. Y. 373. See Jordan *v.* Miller, 75 Va. 442.

Where one partner has the right to settle the affairs of the partnership, as for instance if the articles give him the right, or he is the sole surviving or solvent partner, a receiver will not be appointed without good cause to take the settlement out of his hands. *Ex parte* Owen, 13 Q. B. D. 113 (C. A.); Heflebower *v.* Buck, 64 Md. 15; Quinlivan *v.* English, 44 Mo. 46; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21. But if the settling partner neglects his trust, or abuses it by mismanagement or wasting the assets so that the property is in danger, a receiver will be appointed. Word *v.* Word, 90 Ala. 81, 7 So. 412; Miller *v.* Jones, 39 Ill. 54; Berry *v.* Folkes, 60 Miss. 576; Ballard *v.* Callison, 4 W. Va. 326.

Even after the property has been conveyed to a trustee for creditors, the court may in case of dispute interfere and appoint a receiver. Naylor *v.* Sidener, 106 Ind. 179.

If one of the partners is a suitable person for the trust, it is natural and proper that he should be appointed receiver. Collins *v.* Barker, (1893) 1 Ch. 578; Reynolds *v.* Austin, 4 Del. Ch. 24. The receiver should be given control of all the property of the partnership. Morey *v.* Grant, 48 Mich. 326. After a receiver is appointed, the property is within the control of the court, and it is therefore too late for a creditor to secure priority by attachment or other judicial process. Jackson *v.* Lahee, 114 Ill. 287, 2 N. E. 172; McGowan *v.* Myers, 66 Ia. 99, 23 N. W. 282. Though after the business has been wound up, and a balance in the receiver's hands adjudged to belong to one partner, it may be reached by a creditor of that partner, since it is now too late to interfere with the proceedings of the court. Willard *v.* Decatur, 59 N. H. 137. And before decree on the bill a creditor may levy. Ross *v.* Titsworth, 37 N. J. Eq. 333.

It has, perhaps, some exceptions. If a wrong-doing partner seeks to exclude his copartner from any knowledge of the business, or from any share in the management of it, the injured partner may have a receiver to take and keep possession of the property until the courts determine the rights of the partners; and in the mean time the decree may provide for the continuance of the business. It is not, however, to be denied, that strong authorities insist that a receiver can be appointed, without dissolution, only for the most stringent reasons. (*k*)

But, in general, wherever the main purpose of the suit is to compel partners to perform in good faith their own agreements or their obvious duties, and the appointment of a receiver seems necessary to prevent great mischief from being done before the main question can be settled, we presume that such appointment would be made. (*l*)

It has indeed been distinctly decided in England, that the absence of a prayer for dissolution is not a sufficient ground for a demurrer to a bill praying for the appointment of a receiver. (*m*)

§ 219. **Receiver after Dissolution.** — The far greater number of appointments of receivers occur in cases where a dissolution has taken place or is necessary or is intended; (*n*) and one or more of the partners violates either the express agreements or articles of the partnership, or some obvious and certain duty imposed by law. (*o*) The most frequent cause — and it is one that is, perhaps,

(*k*) Wilson *v.* Greenwood, 1 Swanst. 480. See next note, and Case of Hale *v.* Hale.

(*l*) See Const *v.* Harris, Turner & R. 496, 517; 3 Dan. Ch. Pr. 1967; Milbank *v.* Revett, 2 Meriv. 405, 406; Glassington *v.* Thwaites, 1 Sim. & S. 130, and note; Roberts *v.* Eberhardt, 1 Kay, 148. In Hale *v.* Hale, 3 McN. & G. 79 (see same case, 12 Beav. 414), the general doctrine on this point was said to be, that where it is not the object of the suit to obtain a dissolution of the partnership, but, on the contrary, to continue the partnership, it is not according to the practice of the court to grant, in the course of that suit, the appointment of a receiver and manager. And the only limitation upon this doctrine adverted to was where a party was so conducting himself that, unless a manager was appointed before the hearing, the partnership concern might, in the mean time, be destroyed. Upon motion for a receiver of a partnership, the court will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights. Blakeney *v.* Dufaur, 15 Beav. 40. See Sloan *v.* Moore, 37 Pa. 217.

(*m*) Fairthorne *v.* Weston, 3 Hare, 387.

(*n*) See Fairburn *v.* Pearson, 2 McN. & G. 144. In this case, Lord Chancellor Cottenham refused, upon motion, to appoint a receiver of a partnership, where the question raised was whether the partnership had been dissolved, but directed an issue to try the fact. See Goulding *v.* Bain, 4 Sandf. 716.

(*o*) Harding *v.* Glover, 18 Ves. 281; Estwick *v.* Conningsby, 1 Vern. 118; Crawshay *v.* Maule, 1 Swanst. 507; Henn *v.* Walsh, 2 Edw. Ch. 129; Gowan *v.* Jeffries, 2 Ashm. 296. But in accordance with what we have already seen with res-

always sufficient — is the taking exclusive possession by a partner of the property or books of the partnership, and his refusal to admit his copartner to his rights as to the property and the business. (*p*) But the same reason and the same principle apply to any other instance of substantial wrong on the part of a partner, implied or threatened, of such a kind that the court can only prevent it by taking the property and books out of his hand. (*q*)

It is to be observed, however, that exclusive possession alone is not sufficient cause. This may result from the articles, or the agreement, or the plaintiff may not object to it; (*r*) for it must be an injurious and unjustified possession of the books or property. And the ground on which receivers are appointed in such cases is, that every partner has the same perfect right to hold the property and manage the business that every other partner has; and that the violation of this right is one of the greatest wrongs that can be done to a partner. (*s*)

pect to other modes of equitable interference, a receiver will not be granted on slight grounds. Speights *v.* Peters, 9 Gill, 472; Hammil *v.* Hammil, 27 Md. 679. Dissolution alone is not sufficient, Harding *v.* Glover, *supra;* and there must be more than trifling misconduct, Goodman *v.* Whitcomb, 1 Jac. & W. 589, 593; Const *v.* Harris, Turner & R. 518. Thus a receiver will not be appointed merely because partners quarrel, Texiere *v.* Da Costa in Chancery, Nov. 1815, cited in Collyer on Part. § 354, note; Henn *v.* Walsh, 2 Edw. Ch. 129; nor because an injunction *ex parte* has been granted, Garretson *v.* Weaver, 3 Edw. Ch. 385. And the dissolution which takes place on the refusal of an appointee under a will to become a partner is clearly not a dissolution arising from the exclusion of the appointee by the surviving partner; and will, therefore, be no foundation for a receiver. Kershaw *v.* Matthews, 2 Russ. 62.

(*p*) Wilson *v.* Greenwood, 1 Swanst. 471, 483; Blakeney *v.* Dufaur, 15 Beav. 40; Const *v.* Harris, Turner & R. 525. See Norway *v.* Rowe, 19 Ves. 144, 159; Katsch *v.* Schenck, 13 Jur. 668; Peacock *v.* Peacock, 16 Ves. 49; Milbank *v.* Revett, 2 Meriv. 405, 406; Harding *v.* Glover, 18 Ves. 281. See farther Speights *v.* Peters, 9 Gill, 472; Gowan *v.* Jeffries, 2 Ashm. 296; Wolbert *v.* Harris, 3 Halst. Ch. 605; Hall *v.* Hall, 12 Beav. 414; Boyce *v.* Burchard, 21 Ga. 74. Upon apparently this ground of exclusion, it seems to be held, in New York, that if a general assignment to pay creditors has been made by one partner, under circumstances which make it clear that it is the act of one partner only, without the knowledge and approval of the other partners, the assignment may be declared void, and a receiver appointed. See Rutter *v.* Tallis, 5 Sandf. 610; Hayes *v.* Heyer, 3 Sandf. 284, 293, 4 Sandf. Ch. 485; Wetter *v.* Schlieper, 4 E. D. Smith, 707.

(*q*) See Gowan *v.* Jeffries, *supra*, as to when the court will take the joint property out of the possession of the parties, by appointing a receiver. See also Butchart *v.* Dresser, 4 De G., M. & G. 542; Geortner *v.* Trustees, &c., 2 Barb 625, 628; Smith *v.* Jeyes, 4 Beav. 503; Hale *v.* Hale, 4 Beav. 369.

(*r*) Blakeney *v.* Dufaur, 15 Beav. 40; Parkhurst *v.* Muir, 3 Halst. Ch. 307. And where one partner thus has the legal and rightful possession and control of the partnership funds, the court interferes to take them out of his hands with great reluctance, and only for cogent reasons. Walker *v.* Trott, 4 Edw. Ch. 38; Drury *v.* Roberts, 2 Md. Ch. 157; Waters *v.* Taylor, 15 Ves. 10, 15.

(*s*) Gowan *v.* Jeffries, 2 Ashm. 296; Butchart *v.* Dresser, 4 De G., M. & G. 542.

§ 220. **Temporary Receiver to Preserve Business.** — In some cases a receiver has been appointed to carry on the business, in order to preserve the good-will until it can be sold. (*t*) And the receiver appointed for this, or indeed for any purpose, sometimes continues to act for a considerable time, as for one or two or more years. (*u*) But the appointment is in its nature a temporary one. (*v*) Courts sometimes object very strongly to a long continuance of it, and cut it short by order of sale or settlement. (*w*)

A difference must be made in this respect, however. Where the receiver is appointed to wind up a concern, he generally holds possession until a final and completed settlement; and this may require a long period. The receivership of insolvent banks in some instances continues for years, and the settlement of a widely extended partnership business may require as much time as that of any bank. But where a receiver has only to hold possession for a definite purpose, and carries on the business to preserve the good-will or for any similar object, the court will hasten the completion of his duty and the discharge of his appointment as much as they can without doing harm.

§ 221. **Appointment of Receiver Discretionary with Court.** —

Hence, where it appeared that each of two joint adventurers was equally entitled to the possession of the joint effects, and one had enjoined the other from receiving or disposing of the same; on the application of the latter, a like injunction was granted against the former, without any proof of insolvency or other special cause for depriving him of the control; and on the latter's motion, also, a receiver was appointed, though his original complaint contained no prayer for a receiver. McCracken *v.* Ware, 3 Sandf. 688. If the partner applying for a receiver has the property in his own possession, there will generally be no ground for appointing one. Smith *v.* Lowe, 1 Edw. Ch. 33; though, if the defendant be insolvent, and persist in negotiating bills of exchange in the partnership name, and in applying the money to his own purposes, a receiver may be appointed. Hoffman *v.* Duncan, 17 Jur. 825. Nor will a right to a receiver exist on the part of a partner, *who has practically the sole direction of the business*, merely because the other partner will not co-operate with him. Roberts *v.* Everhardt, 1 Kay, 148.

(*t*) Marten *v.* Van Schaick, 4 Paige, 479. In this case, where the partnership was in a political newspaper, the good-will constituted a chief part of the value of the joint property. See Williams *v.* Wilson, 4 Sandf. Ch. 379.

(*u*) See Crane *v.* Ford, Hopkins, 114.

(*v*) Waters *v.* Taylor, 15 Ves. 10; Const *v.* Harris, Turner & R. 496, 518; Goodman *v.* Whitcomb, 1 Jac. & W. 592; Marten *v.* Van Schaick, 4 Paige, 479; Wolbert *v.* Harris, 3 Halst. Ch. 605.

(*w*) Crane *v.* Ford, *supra*, where, the owners of a steamboat being in litigation, a receiver had been appointed under whom the vessel had run for two years; a third season approaching, and it being necessary to fit out the vessel, or to let it lie useless, the court thought it highly inconvenient and unfit that such operations should be conducted under its direction for so long a time, and ordered a sale. A receiver appointed by the courts of one State has no power to act in a foreign jurisdiction. Harvey *v.* Varney, 104 Mass. 436; Booth *v.* Clark, 17 How. 322.

The application for a receiver is always addressed to the discretion of the court, and is therefore answered very differently, as the merits of the case or the objections to such appointment affect the court. (*x*) In England, it was said in one case, and that a case of embezzlement, that a receiver would not be appointed but on the most extreme and gross abuse, because it would destroy the business. (*y*) This would be a good reason where the appointment would have that effect, and where a closing of the business is not desired. (*z*)

But, on the other hand, it seems to be understood in this country, (*a*) and certainly in New York, (*b*) that whenever partners are wholly unable to agree among themselves as to the disposition and control of the property and business, and neither consents to the possession and control which the other claims or desires, a receiver will be appointed on application, almost as a matter of course, and as a first step towards a final settlement of the affairs of the partnership. (*c*)

(*x*) The discretion which the courts exercise in the appointment of a receiver is well illustrated in those cases where *ex parte* applications are made. As a general rule, a receiver will not be appointed until after the defendant has answered. Holden *v.* McMakin, 1 Pars. Sel. Cas. 284 ; 3 Dan. Ch. Pr. (Perkins' ed.) 1974. But in urgent cases, where it appears to the court that the merits of the case, as shown by the affidavits, require the *immediate* appointment of a receiver, the court may do so upon the plaintiff's motion before answer. Wilson *v.* Greenwood, 1 Swanst. 483 ; Duckworth *v.* Trafford, 18 Ves. 283 ; Gowan *v.* Jeffries, 2 Ashm. 296 ; 3 Dan. Ch. Pr. (Perkins' ed.) 1974. So also it is clear that, as a general rule, a receiver ought not to be appointed until after notice to all the interested parties, unless the court can see that delay would work irreparable injury to some or all of the parties, when a receiver may be appointed without notice. People *v.* Norton, 1 Paige, 17 ; Williamson *v.* Wilson, 1 Bland, 418 ; Gowan *v.* Jeffries, *supra*, 3 Dan. Ch. Pr. (Perkins' ed.) 1975, n.; 1 Barb. Ch. Pr. 667, 669 ; Edw. on Receivers (Rev. ed.), 13–16.

(*y*) Oliver *v.* Hamilton, 2 Anst. 453.

(*z*) Waters *v.* Taylor, 15 Ves. 10. See Madgwick *v.* Wimble, 6 Beav. 495.

(*a*) See Speights *v.* Peters, 9 Gill, 472 ; Williamson *v.* Wilson, 1 Bland, 418, 426 ; Walker *v.* House, 4 Md. Ch. 39 ; Terrell *v.* Goddard, 18 Ga. 664. In Birdsall *v.* Colie, 2 Stock. 63, complainant filed his bill, praying a dissolution of partnership, an account, and a receiver. The bill charged improper conduct on the part of the defendant, the partner. Defendant answered, denying all charges of improper conduct, &c. It was held, that *when a partnership is dissolved by mutual consent, or determined by the will of either party,* a court of chancery *will not, as of course,* without any other reason, except that such is the wish of one of the parties interested, assume the control of the business, and place it in the hands of a mere stranger. Otherwise, if the partnership is not determinable at will, and the court is resorted to for the purpose.

(*b*) Law *v.* Ford, 2 Paige, 310 ; Marten *v.* Van Schaick, 4 Paige, 479 ; McCrackan *v.* Ware, 3 Sandf. 688 ; Goulding *v.* Bain, 4 Sandf. 716 ; Williams *v.* Wilson, 4 Sandf. Ch. 379 ; Dunham *v.* Jarvis, 8 Barb. 88 ; Wetter *v.* Schlieper, 4 E. D. Smith, 707.

(*c*) Perhaps the difference which has been supposed to exist between the English and American law on this point (see Gowan *v.* Jeffries, 2 Ashm. 304) is after all rather seeming than real, and arises rather from an apparent contradiction in

Although one only is acting partner, having the property in his possession, buying and selling, keeping the accounts, &c., a receiver will be appointed to take these things out of his hands, on allegation and evidence that he abuses his powers or neglects his duties, and in either way importantly endangers the interests of his copartners. (*d*)

§ 222. **Appointment of Partner as Receiver.** — It is not uncommon for the appointment of receiver to fall upon one of the partners. (*e*) Of course this is not done where there are charges and countercharges, and a conflict of interests and rights. But

the terms of the rule, as it has been laid down by the courts of the respective countries, than from any substantial difference in practice. Waters *v.* Taylor, 15 Ves. 10, above cited, note (*v*), was decided upon its particular facts, the subject-matter of the partnership being of a peculiar nature. And the language of Chancellor Walworth may not be irreconcilable with that used by the court in Oliver *v.* Hamilton, 2 Anst. 453, all the circumstances being taken into consideration. In Oliver *v.* Hamilton, a partner applied for a receiver, while the trade was going on; and it does not appear, from the imperfect report of the case which we have, that a dissolution of the partnership was either asked for or desired. If it was not, then it was a case, where, as we have seen (*ante,* § 218), the court always interferes with great reluctance, both from a regard to the interests of the parties, and because it is no part of its proper jurisdiction to assume for an indefinite period and purpose the carrying on of trade. On the other hand, in Law *v.* Ford, 2 Paige, 310, and Marten *v.* Van Schaick, 4 Paige, 479, the leading New York cases on the subject, a receiver was asked for to wind up the affairs of the partnership, a dissolution having already taken place, or being desired of the court. But where there is a dissolution, then, both in England and the United States, any substantial wrong done or threatened to the joint interests is sufficient ground for the appointment of a receiver. And in neither country will a receiver be granted for slight reasons, merely because there is an apprehension of danger or loss, or because partners quarrel.

(*d*) Jeffreys *v.* Smith, 1 Jac. & W. 298; Crawshay *v.* Maule, 1 Swanst. 495; Bentley *v.* Bates, 4 Younge & C. 182; Winget *v.* Heathcote, cited id. 187; Hart *v.* Clark, 19 Beav. 349; Sheppard *v.* Oxenford, 1 Kay & J. 491. See Roberts *v.* Eberhardt, 1 Kay, 148; Norway *v.* Rowe, 19 Ves. 144; Christian *v.* Lenhouse, cited 19 Ves. 157, 159.

(*e*) Wilson *v.* Greenwood, 1 Swanst. 471, 484; Waters *v.* Taylor, 2 Ves. & B. 299, 306; Jeffreys *v.* Smith, 1 Jac. & W. 298; *Ex parte* Stoveld, 1 Glyn & J. 303, 307; Blakeney *v.* Dufaur, 15 Beav. 40; Brenan *v.* Preston, 2 De G., M. & G. 813; Hoffman *v.* Duncan, 18 Jur. 69. In Hubbard *v.* Guild, 1 Duer, 662, the court expressed the opinion, "that, in all cases where the dissolution of a partnership is occasioned solely by the insolvency of one of the partners, the solvent partner ought to be appointed receiver, when his capacity and integrity are unquestioned." See Freeland *v.* Stansfield, 16 Jur. 792. And, in the appointment of a receiver, the recommendations of those most interested, and who are most likely to sustain injury without one, will generally be most regarded. The being a near relation of either party is not in itself an absolute disqualification; but it must be allowed to have its weight when connected with other circumstances. Williamson *v.* Wilson, 1 Bland, 418, 427. The general rule, however, is, that no person should be appointed a receiver who is a party to the cause, and not wholly disinterested in the subject-matter of the suit. 3 Dan. Ch. Pr. (Perkins' ed.) 1971; Edw. on Receivers (Rev. ed.), 473. And though generally, by the order of the court directing the appointment, a proper salary is directed to be allowed the receiver, yet,

where a partner prays for a receiver, and the other partner makes no suggestion of wrong against the plaintiff, or of mischief which would arise from his receiving the appointment, there are many obvious reasons for giving it to him. No one knows or ought to know as wel as he the condition of the partnership, and what measures are required to preserve or promote its interests. Indeed, his relation to the firm affords the strongest reasons for appointing him, unless there grow out of the same relation stronger reasons against the appointment.

In one case where a partner thus appointed used the money of the partnership in his own business and made profits, the other partner was not permitted to have a share of them. (*f*) It would seem that an extraordinary indulgence was granted to the receiver in that case. Still the case is not quite similar to those in which a partner, in wrong of the firm, makes money out of a business which belongs to it, or to those in which a surviving partner who by law takes all the effects and has all the power of the partnership, but only for the purpose of settlement, and then continues the business for his own profit. (*g*) Where a partner is receiver to hold the property and business, if he has money of the firm in hand, he may earn interest upon it on his own responsibility (unless prohibited or otherwise directed by the decree), and, as the partnership may charge him with the money and with the interest, and is not liable for any loss of it, it is enough if he allows full interest; always providing nothing in the character of the case or in the appointment makes this use of the money illegal. (*h*)

If a surviving partner abuses his power, and the representatives of the deceased apply for a receiver, the same principles and rules would be applied as in any case in which one of the partners who has a rightful possession and management makes a wrongful use of his possession. (*i*) If equal protection can

if he is an interested party, namely, a partner, where the suit is between partners, he will not be permitted to have any salary or emolument. 3 Dan. Ch. Pr. (Perkins' ed.) 1972, 1976, 1984. See cases cited *supra*, in this note. [Berry *v.* Jones, 11 Heisk. 206.]

(*f*) Whitesides *v.* Lafferty, 3 Humph. 150.

(*g*) *Ante*, § 219, note (*p*).

(*h*) Whitesides *v.* Lafferty, 3 Humph. 150. It may well be doubted whether this case is consistent with the general and well-established principles which regulate the conduct and liabilities of receivers. We have already seen that, when a person is himself interested in the subject-matter over which he has control as receiver, he will not usually be allowed to derive any benefit or emolument from his position. And see Edw. on Receivers (Rev. ed.), pp. 573, 596; and the remarks of Lord Eldon, there quoted, in Shaw *v.* Rhodes, 2 Russ. 539.

(*i*) Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, 1 Swanst. 507;

be given to the representatives of the deceased, by requiring security from the surviving partner, that order may issue instead of the appointment of a receiver; (*j*) but not necessarily. (*k*) If the surviving partner insists upon carrying on the business, and employing therein the assets of the deceased, the court will interfere, and appoint a receiver, if that seems to be the best remedy. (*l*) Where all the partners are dead, upon a suit between their representatives a receiver will be appointed, almost as a matter of course. (*m*)

§ 223. **Practice on Appointment of Receiver.** — An injunction is sometimes granted, or a receiver appointed by the court directly on application and affidavits. Where the parties agree to the person, there can be no objection to this. The English rule is, to refer the case to a master, who will make an appointment, after a hearing of both parties, if they wish to be heard, and will report his appointment to the court for confirmation, unless that be waived or is obviously unnecessary. (*n*) And this we think the safer practice, and suppose it to be frequently adopted in this country. (*o*)

§ 224. **Powers and Duties of Receiver.** — The powers and duties of a receiver, when appointed in a suit between partners, are essentially the same as when he is appointed pending a con-

Gratz *v.* Bayard, 11 S. & R. 41, 48; Walker *v.* House, 4 Md. Ch. 39; Jacquin *v.* Buisson, 11 How. Pr. 385, 394; Collins *v.* Young, 1 Macq. 385; Clegg *v.* Fishwick, 1 McN. & G. 294. See Hartz *v.* Schrader, 8 Ves. 317; Evans *v.* Evans, 9 Paige, 178; Renton *v.* Chaplain, 1 Stock. 62, 70; Hubbard *v.* Guild. 1 Duer, 662.

(*j*) Estwick *v.* Conningsby, 1 Vern. 118; Higginson *v.* Air, 1 Desaus. 427, 429.

(*k*) In Law *v.* Ford, 2 Paige, 310, where the suit was between living partners, a receiver was appointed, notwithstanding that the partner who was in possession of the partnership books and effects was willing to give security for the faithful application of the effects in payment of the debts.

(*l*) Madgwick *v.* Wimble, 6 Beav. 495; Clegg *v.* Fishwick, 1 McN. & G. 294; Walker *v.* House, 4 Md. Ch. 39.

(*m*) The ground of the appointment of a receiver in such a case is thus stated by Lord Kenyon, in Phillips *v.* Atkinson, 2 Bro. C. C. (Perkins' ed.) 272: "Where there is a copartnership, there is a confidence between the parties, and, if the one dies, the confidence remains, and he shall receive; but, when both are dead, there is no confidence between the representatives, and, therefore, the court will appoint a receiver." Walker *v.* House, 4 Md. Ch. 39, 43.

(*n*) The master's judgment as to the proper person is never disturbed, unless some substantial objection be shown. If such objection be shown, the court will then refer it back to the master to review his report. 3 Dan. Ch. Pr. (Perkins' ed.) 1976, 1979, 1981; Edw. on Receivers (Rev. ed.), ch. 4, pp. 95, 96. See Lottimer *v.* Lord, 4 E. D. Smith, 183; 1 Barb. Ch. Pr. 669, 673.

(*o*) In some of the States, as it seems, the court, without any reference, will directly receive and act upon the nominations of the parties of suitable persons for receiver. Williamson *v.* Wilson, 1 Bland, 418, 427; Gowan *v.* Jeffries, 2 Ashm. 296, 307.

troversy between other parties. He is always the officer of the court, and, as such, takes into his possession the partnership property, (*p*) receives the issues and avails thereof, and is bound to account for such receipts whenever the court requires. (*q*) Not unfrequently he not only receives and gets in outstanding funds, but also superintends and carries on the partnership business. (*r*)

The rules by which the receiver is to govern his action in any given instance, and the methods or principles by which, in each particular case, he is to manage and carry on the partnership business and collect and receive and dispose of its funds, cannot be described in general terms. They are, for the most part, dependent upon the decree appointing him; in which his powers and duties are generally defined and enumerated with much minuteness. (*s*)

By the same decree, partners or other persons who have done or are supposed to threaten wrong, are usually restrained from any acts which would interfere with the duties of the receiver, or in any way render the appointment less useful and effectual. (*t*) In England, we believe, the receiver is not authorized to bring suits at law or in equity, unless merely to collect debts, and

(*p*) The general principle as to the property which the receiver will take into possession, by virtue of his appointment, is that he will assume not only everything liable to be taken under an execution at law, but also everything that is considered in equity as assets. 3 Dan. Ch. Pr. (Perkins' ed.) 1970; Edw. on Receivers (Rev. ed.), 6. Hence, the receiver of a partnership will take, as part of the assets of the firm, real estate held in severalty by the different partners, but purchased and used for partnership purposes, and paid for with partnership funds. Smith *v.* Danvers, 5 Sandf. 669.

(*q*) 2 Story Eq. §§ 831–833; 3 Dan. Ch. Pr. (Perkins' ed.) 1949, 1976, 1977; Wolbert *v.* Harris, 3 Halst. Ch. 605, 622. A receiver appointed in a partnership suit, even without any formal assignment, becomes trustee of the assets for all the firm creditors; and, while this trust continues, one partner cannot give a preference, nor can a creditor gain one by judgment. Edw. on Receivers (Rev. ed.), 341; Waring *v.* Robinson, 1 Hoff. Ch. 524; Williamson *v.* Wilson, 1 Bland, 418, 435, 436; Walker *v.* House, 4 Md. Ch. 39, 51.

(*r*) *Ante*, § 220, and notes; 3 Dan. Ch. Pr. (Perkins' ed.) 2006. In the case of Banks *v.* Gould, decided by Chancellor Kent, and cited in Edw. on Receivers (Rev. ed.), 316, et seq., inasmuch as the firm had two establishments, one at Albany and the other in New York, two receivers were appointed. The writer above cited remarks, however, that it may be a question whether the course should not have been to have had one receiver, with liberty to appoint an agent. See cases cited in Edw. on Receivers (Rev. ed.), 324.

(*s*) Smith on Receivers, 186; 2 Story Eq. § 833; 3 Dan. Ch. Pr. (Perkins' ed.) 1987, 1988; Edw. on Receivers (Rev. ed.), 5. See Skip *v.* Harwood, where a receiver was appointed for a brewery, 3 Dan. Ch. Pr. (Perkins' ed.) 1968, note; 1 Dick. 114.

(*t*) See *supra*, Skip *v.* Harwood; and, for a general form of the decree appointing a receiver of a partnership, Edw. on Receivers (Rev. ed.), 341. See also Seton's Decrees, 323.

not always for that. (*u*) But in this country the power is frequently, not to say generally, given to him, to bring any actions necessary for the proper discharge of his duties, (*v*) and provision is made for the indemnification, out of the effects in his hands, of those in whose names he brings such actions. (*w*)

§ 225. **Torts between Partners.** — Pleadings in equity, in a suit between partners, would be more properly considered in a treatise on Chancery Practice and Pleading. Little variation from the ordinary rules and practice seems to be required by the fact that the cause of action between the parties arises from their relation as copartners. Some points, which might be considered under this head, are treated of under the particular topics with which they seem to be more particularly connected. Thus, in the chapter on Account, we shall endeavor to show who may file a bill for an account, who must be made parties, and what pleas are held to be a good bar to such a bill, and equity topics are discussed in other places. Here, therefore, we will only add, that, if the fact of the partnership is disputed in a suit in equity purporting to be between partners, a court of equity may direct an issue to ascertain the truth; (*x*) and, it seems, may even order that the parties themselves be examined at the trial. (*y*) But such an issue will not be directed, unless the point is very doubtful. (*z*)

So far as there are personal torts, they can hardly have any relation to the partnership; and neither party can be affected in right, obligation, or remedy, by the fact that he is a partner. (*a*)

(*u*) Estwick *v.* Conningsby, 1 Vern. 118; Dacie *v.* John, McCleland, 575; 2 Story Eq. §§ 833, 834; Seton's Decrees, 323.

(*v*) See the remarks of Ames, C. J., in Tillinghast *v.* Champlin, 4 R. I. 173, 188. See Iddings *v.* Bruen, 4 Sandf. Ch. 417, 422; Green *v.* Bostwick, 1 Sandf. Ch. 185, 186.

(*w*) 3 Dan. Ch. Pr. (Perkins' ed.) 1977, 1991; Edw. on Receivers (Rev. ed.), 136, 342, 343; Seton's Decrees, 323, 324. A receiver cannot maintain an action of trover, in his own name, for partnership effects converted before his appointment; he must sue in the name of the firm. Yeager *v.* Wallace, 44 Pa. 294.

(*x*) Peacock *v.* Peacock, 16 Ves. 49; *Ex parte* Langdale, 18 Ves. 300; Binford *v.* Dommett, 4 Ves. 756; Jacobsen *v.* Hennekenius, 5 Bro. P. C. 482, 1 Bro. P. C. (Dublin ed.) 432. In this last case, the issue directed to be tried was whether a party was a real or a nominal partner.

(*y*) De Tastet *v.* Bordenave, Jac. 516. But see, on this point, 2 Dan. Ch. Pr. (Perkins' ed.) 1298.

(*z*) Forster *v.* Hale, 5 Ves. 308, 322; Metcalf *v.* Royal Exchange Ass. Co., Barnard. 343. As to the constitutional right which citizens may have, in the different States, to have matters of fact, alleged in the bill and denied by the answer, tried by a jury, see Sedgwick Const. Law, 542–548; 2 Dan. Ch. Pr. 1289, note (1); Adams Eq. [376], 815, note.

(*a*) Where one partner, by violence, forces his copartner out of the business premises of the firm, and threatens such copartner with violence and danger to his life, if the latter should venture again to enter the premises, and it is necessary for such copartner to enter and use the premises for the purposes of carrying on his

Of torts in relation to the partnership or its property, nearly all will be comprehended either in fraud or waste; for both of which the remedy in equity is prompt and efficacious, (*b*) as we have already seen.[1]

§ 226. **Conversion by Partner of Firm Property.** — Some question may exist whether the rules of law, in cases of tenancy in common, do not apply in this respect to cases of partnership. A tenant in common may maintain trover against a cotenant for a destruction, total or partial, of the common property by him. (*c*) It has been held, that a sale of the whole, without authority, may be regarded as such destruction. (*d*) But no tenant in common can maintain

ordinary business as partner, the court will permit the latter to exhibit articles of peace against the former. Regina *v.* Mallinson, 16 Q. B. 367.

(*b*) The plaintiff and defendant were partners; and it appeared, by the complaint, that the action was brought to recover damages for the fraudulent removal by the defendant of a stock of goods belonging to the firm. An order of arrest was applied for upon affidavits setting forth the fraud. Duer, J., refused to grant the order; holding that the action was not maintainable, and that the plaintiff had no proper remedy but in a suit for an injunction and a receiver. Approved by the court in Cary *v.* Williams, 1 Duer, 667.

(*c*) Buller, N. P. 34; 2 Saund. on Pl. & Ev. 1163; Cowan *v.* Burgess, Cooke, 58; Seldon *v.* Hickock, 2 Caines, 167; Tubbs *v.* Richardson, 6 Vt. 442; Hurd *v.* Darling, 14 Vt. 214; Herrin *v.* Eaton, 13 Me. 193; Guyther *v.* Pettijohn, 6 Ired. 388.

(*d*) The doctrine, as at present settled by the English authorities, is, that the *mere* sale of a chattel by one of two tenants in common is not a conversion for which his cotenant can maintain trover. The disposition of the chattel must be such as amounts to a destruction of it. See Mayhew *v.* Herrick, 7 C. B. 229. In this case, the point was elaborately discussed, and all the leading authorities reviewed. See Higgins *v.* Thomas, 8 Q. B. 908; Barton *v.* Williams, 5 B. & Ald. 395, 402, 403; Farrar *v.* Beswick, 1 M. & W. 685, 688; Jackson *v.* Anderson, 4 Taunt. 24; Fennings *v.* Grenville, 1 Taunt. 241; Heath *v.* Hubbard, 4 East, 110; Graves *v.* Sawcer, T. Raym. 15; 1 Chitty P. C. 90, 91, 179, note; 2 Saund. Pl. & Ev. (5th Am. ed.) pt. 2, 1164, 1166, 1168. In this country, the rule has been frequently laid down, without qualification, that a tenant in common may bring trover against his cotenant, for a conversion, by a sale, of the entire property held in common. Wilson *v.* Reed, 3 Johns. 175; Hyde *v.* Stone, 9 Cowen, 230, 7 Wend. 354; Tyler *v.* Taylor, 8 Barb. 585; Farr *v.* Smith, 9 Wend. 338; White *v.* Osborne, 21 Wend. 72; Odiorne *v.* Lyford, 9 N. H. 511; White *v.* Phelps, 12 N. H. 386; Thomson *v.* Cook, 2 South. 580; Weld *v.* Oliver, 21 Pick. 559; Starnes *v.* Quin, 6 Ga. 84; Rains *v.* McNairy, 4 Humph. 356; Smyth *v.* Tankersley, 20 Ala. 212; Perminter *v.* Kelly, 18 Ala. 716; Cowles *v.* Garrett, 30 Ala. 341.

[1] It was held in Mills *v.* Fellows, 30 La. Ann. 824, that one partner cannot bring an action against his copartner for an injury to the business caused by the debauchery and bad habits of the latter. It is a good ground for dissolution; but if the partners continue the business, and the wrongdoing is thus in a sense condoned, the court will not bring the scandal to light. In Boughner *v.* Black, 83 Ky. 521, however, it was held that where A. sold an interest in his business to B., and now sued on a note given in payment, B. might recoup damages suffered from the fraudulent acts of A. in the course of the firm business, whereby the good-will and credit of the firm were damaged: since that is a cause of action for a partner.

trover grounded on the mere possession of his cotenant, however exclusive this cotenant insists upon making it, for the technical reason that each tenant in common is entitled to the possession of the property. (*e*) Nor should we think that trover would lie by a partner, against his copartner, for constructive destruction by a sale of the whole thing, because, by the law of partnership, a partner has this power of sale. (*f*) Nor should we think it would lie in general for the actual destruction of a thing by a copartner. For, although a partner has no legal right to destroy anything, — unless by possibility even that should be fairly incident to the business of the partnership, — yet, if he does destroy it, this might be taken as an appropriation by him, to be charged to him on account; and this charge would then be settled like others, only by a settlement of accounts.[1]

It has been held in this country, that detinue may be maintained by a surviving partner against the representatives of a deceased partner, for the books of account of the firm; (*g*) and there is a

See, however, Tubbs *v.* Richardson, 6 Vt. 442; Sanborn *v.* Merrill, 15 Vt. 700; Pitt *v.* Petway, 12 Ired. 69. Perhaps, however, notwithstanding the language of some cases, and the actual adjudication in others, the rule in this country is, after all, to be considered as substantially the same with the English rule. That is, in both countries, a sale of the common property by one cotenant may be *per se* a conversion, — is always admissible evidence of it, — but is not *necessarily* a conversion upon which trover may be founded, unless it is tantamount to a destruction of the subject of the tenancy. See St. John *v.* Standring, 2 Johns. 468; Mersereau *v.* Norton, 15 Johns. 179; Bell *v.* Lagmans, 1 Monroe, 40; Hinds *v.* Terry, Walker, 80.

(*e*) Co. Litt. 200; Buller N. P. 34; 1 Salk. 290; Holliday *v.* Camsell, 1 T. R. 658; Fennings *v.* Grenville, 1 Taunt. 241; St. John *v.* Standring, 2 Johns. 468; Mersereau *v.* Norton, 15 Johns. 179; Gilbert *v.* Dickerson, 7 Wend. 449; Tyler *v.* Taylor, 8 Barb. 585; Weld *v.* Oliver, 21 Pick. 559, 562; Cole *v.* Terry, 2 Dev. & B. 252; Fightmaster *v.* Beasly, 7 J. J. Marsh. 415; Dain *v.* Cowing, 22 Me. 347; Weeks *v.* Weeks, 5 Ired. Eq. 111, 119. See Lowe *v.* Miller, 3 Gratt. 205; Agnew *v.* Johnson, 17 Pa. 373. In Illinois, the common-law rule is so far modified by statute as to allow one tenant in common to support trover against a cotenant who assumes exclusive control over the joint property. Benjamin *v.* Stremple, 13 Ill. 466. See 2 Ill. Stat. (1863) 960.

The general principle holds after the bankruptcy of a partner, and his assignees cannot maintain trover against the other partners, their representatives, or assigns. Fox *v.* Hanbury, Cowp. 445; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, 1 East, 368; Salomons *v.* Nissen, 2 T. R. 674, 682.

(*f*) Montjoys *v.* Holden, Litt. Sel. Cas. 447; Hyde *v.* Stone, 9 Cowen, 230. See Furlong *v.* Bartlett, 21 Pick. 401; Wilson *v.* Reed, 3 Johns. 175, 178.

(*g*) Murray *v.* Mumford, 6 Cow. 441. The ground taken by the court in this case was, that a dissolution of a partnership did not, *ipso facto*, destroy the joint tenancy of the partners in the partnership property, and create a tenancy in common, but the

[1] But where the individual property of one partner, used in the business, was destroyed by the negligence of the other partner, the owner may sue his copartner at law for the destruction. Newby *v.* Harrell, 99 N. C. 149, 5 S. E. 284.

similar, though perhaps not quite an equal, reason for allowing the same action, by a partner, against a partner who keeps wrongful possession of the books. We deem the reason insufficient in both cases, and the remedy itself unnecessary. Indeed, detinue is almost wholly disused. And the remedies of equity are so completely adequate, wherever a partner is injured by the wrong-doing of his copartner in matters relating to the partnership, that we doubt whether any resort to law in such cases can be necessary, or will be sanctioned by the courts.

§ 227. **Fraud inducing Entrance into Partnership.** — [One who has been induced to enter into a partnership by the false representations of his copartner may maintain an action at law for the deceit.[1] The measure of damages is the net amount of money he has paid in, and compensation for his time.[2]

He may also maintain a bill to rescind the partnership agreement. He will then be entitled to a restitution *in integrum* by the allowance of damages or otherwise, to an injunction against the use of his name as partner, and to an indemnity against the firm debts.[3]]

§ 228. **Statute of Limitations between Partners.** — The statute of limitations begins to run at the death of a partner, in favor of his personal representatives against a claim to have an account of profits received by him. (*yy*) [4]

partnership continued, for the purpose of settling the partnership affairs; that, in case of dissolution by death, the surviving partner was entitled to all the choses in action, and other evidences of debt belonging to the firm, and was entitled to the exclusive custody and control of them; that the books of account were incidents to the debts or choses in action; and that whoever was entitled to the one was, of course, to the other. See Clowes *v.* Hawley, 12 Johns. 487. A bill in equity by one copartner, against one of three other copartners, to recover his share of a sum of money obtained by the other three by mistake in settlement at the time of dissolution, is demurrable for non-joinder of the other two. Johnston *v.* Freer, 51 Ga. 313.

(*yy*) Weisman *v.* Smith, 6 Jones, Eq. 124. Partners *inter sese* hold partnership effects for each other under an implied trust; and the statute of limitations rests upon their respective claims against each other, in this regard, and begins to run on the occurrence of a breach of trust; and, when one is to collect and pay over the funds, the statute is not set in motion till there is a failure in the performance of that duty. Condrey *v.* Gilliam, 60 Mo. 86.

[1] Baldey *v.* Brackenridge, 39 La. Ann. 660, 2 So. 410; Hale *v.* Wilson, 112 Mass. 444.

[2] Mycock *v.* Beatson, 13 Ch. D. 384; Richards *v.* Todd, 127 Mass. 167.

[3] Newbigging *v.* Adam, 34 Ch. D. 582 (C. A.); Oteri *v.* Scalzo, 145 U. S. 578; Smith *v.* Everett, 126 Mass. 304; Andriessen's Appeal, 123 Pa. 303, 16 Atl. 840.

[4] *Statute of Limitations:* — The statute of limitations may be a bar to the claim of one partner against another. As the ordinary remedy of one partner against another is in equity, the defence to a bill for an accounting is strictly not the statute of limita-

tions, but laches or lapse of time. Philippi *v.* Philippi, 61 Ala. 41. Where the partnership articles are under seal, and secure the right to an account, the right will not be barred until the period of limitations for sealed instruments has elapsed. Near *v.* Lowe, 49 Mich. 482, 13 N. W. 825.

In Illinois the statute of limitations begins to run against a partner's claim from the time of dissolution. Pierce *v.* McClellan, 93 Ill. 245; Askew *v.* Springer, 111 Ill. 662; Blake *v.* Sweeting, 121 Ill. 67, 12 N. E. 67; Bonney *v.* Stoughton, 122 Ill. 536, 13 N. E. 833. Thus, it runs from the death of a partner. Quayle *v.* Guild, 91 Ill. 378. The same rule seems to prevail in Iowa. Richards *v.* Grinnell, 63 Ia. 44, 18 N. W. 668.

The better view, however, seems to be opposed to this. One partner may, to be sure, bring a bill for an accounting at once upon dissolution; but until a demand for an accounting is made, either by bringing a bill or otherwise, neither party is in default to the other for not rendering an account. There must be some refusal to account or other adverse act in order to set the statute running. Rencher *v.* Anderson, 95 N. C. 208. And the mere fact of death or dissolution is not enough. Riddle *v.* Whitehill, 135 U. S. 621.

Since one partner generally has no cause of action against the other till the debts are paid, the statute does not begin to run until all debts are paid at least. Brewer *v.* Browne, 68 Ala. 210; Miller *v.* Harris, 9 Baxt. 101; Jordan *v.* Miller, 75 Va. 442; Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713. And the true rule would seem to be that the statute begins to run only when the accounts are settled and a balance struck; for until that time there is no indebtedness between the partners. Hendy *v.* March, 75 Cal. 566, 17 Pac. 702; Rice *v.* Pennypacker, 5 Houst. 279; Holloway *v.* Turner, 61 Md. 217; McDonald *v.* Holmes, 22 Ore. 212, 29 Pac. 735. In Minnesota, under a peculiar statute, the right of a partner to an account is barred six years after the last assets are paid in to the copartner. McClung *v.* Capehart, 24 Minn. 17. In Alabama it is six years from the last item of the account. Wells *v.* Brown, 83 Ala. 161, 3 So. 439; Haynes *v.* Short, 88 Ala. 562, 7 So. 157.

CHAPTER IX.

OF REMEDIES BY PARTNERS AGAINST THIRD PARTIES.

§ 229. **Remedies for Breach of Contract.** — As a general rule, a partnership has the same remedy, and in the same form, against a third party, that one person has against another. (*a*) We need only advert to the exceptions to this rule, or the qualifications it has received. One of these, derived from the principle that no person can sue himself, or, in other words, that the same person cannot be plaintiff and defendant of record, we have already referred to. (*b*)

§ 230. **Discharge by one Partner.** — It must be true, that a firm cannot bring an action against a third party, on any paper, or any indebtedness which has been discharged in any way by one of the firm, so that there is a perfect defence against one of the plaintiffs. (*c*) For, if he must be one of the plaintiffs, the action

(*a*) If coplaintiffs sue for a debt due to them as partners, they must declare as partners; or, perhaps, it may be sufficient to prove their partnership. Woodworth *v.* Fuller, 24 Ill. 109.

(*b*) *Ante*, § 200; Bosanquet *v.* Wray, 6 Taunt. 597; Mainwaring *v.* Newman, 2 B. & P. 120; Moffat *v.* Van Millenger, 2 B. & P. 124, n.; Portland Bank *v.* Hyde, 11 Me. 196; Englis *v.* Furniss, 4 E. D. Smith, 587; Green *v.* Chapman, 27 Vt. 236; Rogers *v.* Rogers, 5 Ired. Eq. 31; Lacy *v.* LeBrun, 6 Ala. 904; Griffith *v.* Chew, 8 S. & R. 30, 31; Tindal *v.* Bright, Minor, 103; Banks *v.* Mitchell, 8 Yerg. 111; Miller *v.* Thorn, R. M. Charlt. 180; Cole *v.* Reynolds, 18 N. Y. 74 (though otherwise by statute in New York); Eastman *v.* Wright, 6 Pick. 316. Under the code in Indiana, if a partner refuses to join as plaintiff, he may be made a party defendant. Hill *v.* Marsh, 46 Ind. 218.

(*c*) A release by one partner is a bar to any action by the firm, even though made *puis darrein continuance.* Phillips *v.* Clagett, 11 M. & W. 84; Rawstorne *v.* Gandell, 15 M. & W. 304; Campbell *v.* Mullett, 2 Swanst. 569; Bristow *v.* Taylor, 2 Stark. 50; Porter *v.* Taylor, 6 M. & S. 156; Arton *v.* Booth, 4 J. B. Moore, 192; Furnival *v.* Weston, 7 J. B. Moore, 356; Salmon *v.* Davis, 4 Binney, 375; Emerson *v.* Knower, 8 Pick. 63; Pierson *v.* Hooker, 3 Johns. 68; Bruen *v.* Marquand, 17 Johns. 58; Gates *v.* Pollock, 5 Jones, 344; Smith *v.* Stone, 4 Gill & J. 310; McBride *v.* Hagan, 1 Wend. 326; Doremus *v.* McCormick, 7 Gill, 49; Wallis *v.* Wallace, 6 How. (Miss.) 254; Halsy *v.* Fairbanks, 4 Mass. 206. But, as the authority of a single partner to release or receive payment arises only from the partnership, it is necessarily limited to the partnership scope, in the ordinary methods of business.

cannot proceed if it cannot be maintained by him.[1] Whether this objection passes away when the partner discharging the debt is only dormant and secret, or nominal, is, in fact, the same as that considered before, when treating of the relations of two firms with a common partner. There is this difference, however. A secret partner, who actually is one, or a nominal partner who is set forth as one, may lawfully discharge any debt due to the firm; and, therefore, we should say such an action would not lie, unless the discharge had been fraudulent as against the firm, and the fraud brought home, in some way, to the debtor.

§ 231. **Action by Firm against another having Common Member.** — As matter of usage and practice, a firm having paper which they cannot sue, because one of themselves would necessarily be plaintiff and defendant, may indorse the paper to a third party, and there seems to be no objection to his bringing an action upon it at law. (*d*)

(*d*) Davis *v.* Briggs 39 Me. 304; Thayer *v.* Buffum, 11 Met. 398; Pitcher *v.* Burrows, 17 Pick. 361; Parker *v.* Macomber, 18 Pick. 509; Temple *v.* Seaver, 11 Cush. 314; Smith *v.* Tustin, 5 Cow. 688; Blake *v.* Wheadon, 2 Hayw. 109; Babcock *v.* Stone, 3 McLean, 172; Heywood *v.* Wingate, 14 N. H. 73. So in Penn *v.* Stone, 10 Ala. 209, though the indorsee was also assignee of the partner's share both of assets and liabilities, and so ultimately liable to contribute; because this did not render him a partner. But, if the note is not negotiable, it is subject to the same defences in the hands of the indorsee as in those of the payee, being

[1] Where one partner, not having authority to do so, agreed to submit a firm claim to arbitration, and the rest of the firm brought suit in spite of the award, it was held that they might thus sue, joining the other partner as a formal party. The rule that all joint parties must have a cause of action or none can recover does not, the court said, apply in the case of partnership. Fancher *v.* Bibb Furnace Co., 80 Ala. 481, 2 So. 268.

Where one partner assigned firm property in payment of his individual debts, it was held in Pennsylvania that the other partner might sue in trover, like any tenant in common whose cotenant has wrongfully transferred the property; recovering, of course, half the value of the property. McNair *v.* Wilcox, 121 Pa. 437, 15 Atl. 575.

But this seems to lose sight of the fact that a partner is only technically a tenant in common, and has no beneficial interest in the property. The firm should be able to get from the wrongdoer the whole value, not half the value; and the partner has no more right to get half the value of the property in damages than to get three quarters or nothing at all. The better view is that taken in Illinois, where it is held that the partner cannot sue in tort. Sindelare *v.* Walker, 137 Ill. 43, 27 N. E. 59.

C. had dealings with S., who came to owe him a balance. S. formed a partnership with A., of which C. had notice, and dealings continued between C. and the new firm. The firm gave C. its checks on account, which C. by agreement with S. applied to the old balance owed by S. This was held a misapplication; and though the firm could not recover these payments, since S. would be a necessary party, there was nothing to prevent it, through A., from insisting that the checks be applied on the firm debt. Cornells *v.* Stanhope, 14 R. I. 97.

It has been questioned, in some cases, whether the death of the person who is a partner in both the firms removes the bar to an action between them. This is denied by some authorities; but we have doubts whether there be a positive rule to this effect. (*e*) As the bar of a common partner affects not the contract but the remedy, when the death of the common partner removes this technical bar, we should say the survivors might sue. (*ee*) [1] As a general rule, it must be true, that no action can be sustained by a copartnership, properly setting forth the names of the partners, if either of them is disabled from bringing that suit. And the cases must be few, if any exist, in which the law indulges the firm with suppressing the name of the disabled partner, and so bringing the action.

§ 232. **Alien Partner.** — In the case of an alien enemy, the rule seems to be established; and, as a consequence of it, no partnership, of which one member is an alien, can bring, in either of the countries to which the partners belong, any action during a war between those countries. (*f*) How it would be if one partner — all being citizens of one of the belligerents — resided in the country

a mere assignment of a chose in action. Hill *v.* McPherson, 15 Mo. 204. In Timrall *v.* O'Bannon, 7 B. Mon. 603, the same doctrine is held, though it does not clearly appear that the note there was not negotiable.

(*e*) In Bosanquet *v.* Wray, 6 Taunt. 597, it is said, the death of the partner does not remove the bar, as that "goes to the root of the contract." This assertion is repeated by the text-writers, Collyer on Part. § 642, Story on Part. § 234, Gow on Part. 119, 120, and in many cases. See De Tastet *v.* Shaw, 1 B. & Ald. 664; Burly *v.* Harris, 8 N. H. 233, 235. See also Addison on Cont. 732; but it does not seem to have been expressly decided until Miller *v.* Thorn, R. M. Charlt. 180. It is not, however, clear from authority or on principle that this rule is universal. [See *ante*, § 201.]

(*ee*) This is expressly held in Lacy *v.* Le Brun, 6 Ala. 904.

(*f*) McConnel *v.* Hector, 3 B. & P. 113; Albretcht *v.* Sussman, 2 Ves. & B. 323; and see O'Mealey *v.* Wilson, 1 Camp. 482. All causes of action which accrued prior to the war are suspended during the war. But, if the cause of action arises during the war, it seems that the firm are precluded from suit at any time, if their partner be affected with a hostile character when the contract was made. Thus in Griswold *v.* Waddington, 16 Johns. 438, the plea of alien enemy was held a bar to an action brought by a firm after return of peace on a balance accrued during war, one partner — though a native of the country where the suit was brought — being resident in the belligerent country when the balance accrued. And, by the doctrine of the courts both of England and America, it would seem that the right to contract is destroyed *eo instanti* war is declared. See The Venus, 8 Cranch, 253.

[1] Under a statute allowing an action to be brought against one partner on a claim against a firm, a partnership having a claim against another with a common member may sue the other members of the latter firm. Alexander *v.* King, 87 Ala. 642, 6 So. 382; Alexander *v.* Jones, 90 Ala. 474, 7 So. 903; Morris *v.* Hillery, 7 How. (Miss.) 61.

of the other, is a question of some difficulty. The true principle must be, that the rights of the partnership were unaffected by their residence alone, if there were nothing of adherence to the enemy. (*g*) But it might be very difficult to make this distinction applicable, where the foreign residence of the partner was permanent, or even long. (*h*)

§ 233. **Partnership between Man and Wife.** — A different question, previously adverted to, arises, where, by the law of a foreign land, husband and wife may form a mercantile partnership, or both be members of one. At home, they could, of course, bring any action. But, in England and in this country, a wife cannot join with her husband in any such action; and it is said that an action by such a firm cannot be maintained. (*i*) It is, however, possible that the recent legislation of some of our States, giving to the married woman, so far as her property is concerned, almost the *status* of a single woman, might be construed to permit such an action. The rule that, whenever the *lex loci* comes into question, the *lex loci fori* shall determine all questions of remedy, might oppose such an action. But this rule has only been applied to such questions as arise under the statute of limitations, and, perhaps, those of infancy; (*j*) and, on the other hand, the question of disability to make the contract is determined by the law of the place of the contract. On the whole, we should expect that an American court would say, either that the wife might sue with the husband, because of her unquestionable right, at home, or that she could neither sue nor be regarded in this country as a partner, and that her name might be omitted. But the simpler, and certainly the

(*g*) Collyer on Part. § 647, citing Roberts *v.* Hardy, 3 M. & S. 533; but see next note.

(*h*) Roberts *v.* Hardy, 3 M. & S. 533; O'Mealey *v.* Wilson, 1 Camp. 482; The Julia, 8 Cranch, 195; The Rapid, 8 Cranch, 160, 161. In Griswold *v.* Waddington, 16 Johns. 479, Kent, C. J., says of the prohibition of intercourse: "It reaches to all interchange or transfer or removal of property, to all negotiation and contracts, to all communication and all locomotive intercourse; to a state of utter occlusion to any intercourse but one of open hostility, to any meeting but in actual combat." This utter and rigid veto on all intercourse arises *eo instanti* war is declared. See The Venus, 8 Cranch, 253. In 2 Wildman's International Law, 45, it is said that "domicile by residence in the enemy's country is considered as adherence to the enemy, inasmuch as it increases his strength through contribution of taxes and other means, and consequently imposes a hostile character on the person domiciled." It should seem, therefore, that mere residence, if it clearly appear, will, if not shown to be compulsory, amount to adherence to the enemy and support the plea of alien enemy.

(*i*) Collyer on Part. § 646, citing Cosio *v.* De Bernales, Ryan & M. 102. There is, however, no case which decides this question. See the next and following notes. [See *ante*, § 20.]

(*j*) Thompson *v.* Ketcham, 8 Johns. 189.

safer, way would be, to indorse the paper over, if it were negotiable, to some third person who could be made plaintiff.

§ 234. **Indorsement of Firm Paper to Partner.** — As there is no doubt that a firm can indorse their paper to any third party, who may then sue it, so we suppose it clear that they may indorse it over to one of their number, who may then bring the suit in his own name. (*k*) Nor do we see why this indorsement may not be made by the partner who is indorsee. It is every day's practice to make a note payable to the maker's own order. There is no such practice of indorsing to the order of the indorser, because he must then indorse again, in order to designate and authorize a third person to bring suit, and this he can do as well at first. But, where there is any reason for a payee's indorsing to his own order, we see no objection to it; and we should say there could be none to a partner's writing as indorser the name of the firm, and as indorsee his own. (*l*) This power, however, is confined to negotiable paper. In many of our States, the common law as to choses in action has been materially modified; but, where it remains in force, no partner can transfer and assign his interest in a chose in action to the other partner or partners, so that the transferee may bring his action at law in his own name. (*m*) In equity it would be otherwise; (*n*) but such a transfer, for consideration, would

(*k*) Bailey *v.* Lyman, 1 Story, 396; Bolton *v.* Puller, 1 B. & P. 546: Goddard *v.* Lyman, 14 Pick. 268; Russell *v.* Swan, 16 Mass. 314. In Estabrook *v.* Smith, 6 Gray, 570, it was held, that a partner might transfer a partnership note by indorsement in the partnership name to his copartner, but could not by an indorsement in his own; though it was argued that to require the name of the copartner as indorser on the note was to compel him to indorse to himself. But it has been held, that where the indorsement by the firm was merely colorable, to avoid the objection that the maker was a partner, it was held still to be the note of the firm, and that no action could be maintained upon it by the indorsee. Tipton *v.* Nance, 4 Ala. 194. If the indorsement be in the name of one partner only, it passes no interest. McIntire *v.* McLaurin, 2 Humph. 71.

(*l*) Burnham *v.* Whittier, 5 N. H. 334; Kirby *v.* Coggswell, 1 Caines, 505; and see Estabrook *v.* Smith, 6 Gray, 570. In Towle *v.* Harrington, 1 Cush. 146, a note was made by one firm to another, there being a common partner in both. After the death of the common partner, the survivor indorsed the note to himself. The indorsement was held void, but only because the note survived to him as partner, and his indorsement to himself was null. But a partner's right to indorse with the partnership name the partnership paper to himself seems impliedly admitted.

(*m*) The common law (without statutory provision) has nowhere been so modified that the mere assignee of a chose in action can sue in his own name. A mere assignment, therefore, by one partner to his copartner of a partnership demand, gives no right to the assignee to sue in his own name. Tate *v.* Mut. Fire Ins. Co., 13 Gray, 79; Russell *v.* Swan, 16 Mass. 314, and cases cited in note (*p*), *infra*.

(*n*) An assignee has not, however, a resort to equity, merely because he cannot sue in his own name; for, as courts of law admit him to sue in the name of his

authorize the transferee to use the name of the transferring partner, at law, nor could he interfere with the suit in any way. (*o*)

§ 235. **Who must join as Parties.** — It must be the general rule, that all those who were partners at the time a debt was contracted, are those to whom it is due, and they should join in any action to recover the debt. (*p*) And it is, moreover, an unquestioned rule, that no agreement between partners can alter the liability or mode of liability of their debtor, without his assent Thus, by no assignment of a debt due to the partnership by one of the partners, can he acquire the right to sue it in his own name. (*q*) If, however, the assent of the debtor sufficiently appear, and be on a good consideration, an action may be maintained by the partner who is assignee in his own name. (*r*)

assignor, his remedy at law is complete, and equity will not entertain his claim unless inequitable defences are set up in his assignor's name. See 1 Pars. on Cont. (5th ed.) 224, note (*d*), and cases there cited and examined; especially Ontario Bank *v.* Mumford, 2 Barb. Ch. 596.

(*o*) Eastman *v.* Wright, 6 Pick. 316, 322. By the assignment, all property is divested from the assignor, who becomes thereby a merely nominal party, with no interest for a release to act upon, and the release is therefore merely null. Rawstorne *v.* Gandell, 15 M. & W. 304. But notice must also be given the debtor, as without this, which is practically a revocation of the partner's authority to receive or discharge the debt, the debtor has a right to presume each partner still possessed of that authority which the mere fact of partnership confers.

(*p*) Jell *v.* Douglass, 4 B. & Ald. 374; Dob *v.* Halsey, 16 Johns. 34; Hewes *v.* Bayley, 20 Pick. 96; Cushing *v.* Marston, 12 Cush. 431; Gage *v.* Rollins, 10 Met. 348; Halliday *v.* Doggett, 6 Pick. 359; Pearson *v.* Parker, 3 N. H. 366; Parker *v.* Gregg, 23 N. H. 416; Horbach *v.* Huey, 4 Watts, 455; Allen *v.* White, Minor, 365; Snodgrass *v.* Broadwell, 2 Litt. 353; Wright *v.* Williamson, 2 Penning. 978; Wilson *v.* Wallace, 8 S. & R. 53; Tate *v.* Mut. Fire Ins. Co., 13 Gray, 79; Speake *v.* Prewilton, 6 Tex. 352; Jones *v.* Gates, 9 B. & C. 532; Garrett *v.* Handley, 3 B. & C. 462; Cooke *v.* Seely, 2 Exch. 746; Driver *v.* Burton, 17 Q. B. 989; Greeley *v.* Wyeth, 10 N. H. 15.

(*q*) Huey *v.* Horbach, 4 Watts, 455; Clark *v.* Howe, 23 Me. 560; Degroot *v.* Darby, 7 Rich. 117; Cushing *v.* Marston, 12 Cush. 431; Russell *v.* Swan, 16 Mass. 314; *dictum* in Radenhurst *v.* Bates, 3 Bing. 470; Wood *v.* Rutland Ins. Co., 31 Vt. 552. But it seems to have been thought that on dissolution a sole right of action might vest in remaining partners, without any assent or new promise by the debtor. Collyer on Part. § 658, citing Evans *v.* Silverlock, Peake 21; Atkinson *v.* Laing, Dowl. & R. N. P. 16. 1 Lindley Partn. 403, remarks that this case "is more than questionable." We should say that Mr. Collyer's proposition is without authority, and that there is no such exception as "severance by dissolution," to the necessity of joinder of all the partners on a partnership demand. In Louisiana, however, it seems that the liquidating partner on a dissolution of the firm may maintain an action in his own name, only setting forth the fact that the transaction arises out of the business of the firm. White *v.* Jones, 14 La. Ann. 681.

(*r*) Degroot *v.* Darby, 7 Rich. 117; Cook *v.* Beech, 10 Humph. 412; Howell *v.* Reynolds, 12 Ala. 128; McLanahan *v.* Ellery, 3 Mass. 269; Moore *v.* Hill, 2 Peake, 10; Stevens *v.* Lunt, 19 Me. 70, 72; Wood *v.* Rutland Ins. Co., 31 Vt. 552; Aspinwall *v.* Lond. & N. W. R. R. Co., 11 Hare, 325; Armsby *v.* Farnam, 16 Pick. 318.

When such valid assent is given, the action by the assignee in his own name is upon a new contract substituted for the old one on principles similar to those of novation; (s) the discharge of the debtor from his liability to the firm forming the consideration of the new promise. (t) Where, however, the assignment is by an old firm to a new one which includes the old, there would seem to be but two parties in question; for the old firm and the new one are one *quoad* this contract, and the promises of discharge of the old liability, and of payment of the new one by the firm and the debtor respectively, are mutually considerations one for the other. (u) In like manner a new contract may arise by the implied assent of the debtor, who has paid one or more of several joint creditors their respective shares, to pay the other his separate share, and the latter may maintain his separate action therefor. (v)

Persons who leave the firm and cease to be partners may transfer the debt so as to retain no interest in it; but still their names should be used. (w) On the other hand, those who come into the firm after the debt is created may acquire an interest in it, and the debt will be collected for their benefit; but still their names cannot be used. (x) This is true even where the debt was originally contracted with the understanding that it should be a continuing contract, contemplating successive changes in the house, and intended to go through them all and be always a debt to the house, whoever may be its copartners. (y)

(s) See Pars. on Cont. vol. i. pp. 217–222, 5th ed.

(t) This new promise may be express, as in Howell *v.* Reynolds, 12 Ala. 128, and Wood *v.* Rutland Ins. Co., 31 Vt. 582; or implied, as it was in Cook *v.* Beech, 10 Humph. 412, from the debtor's drawing a bill for the amount of the debt in favor of the assignee; or from his admissions, as in Degroot *v.* Darby, 7 Rich. 117.

(u) See Armsby *v.* Farnam, 16 Pick. 318.

(v) Garrett *v.* Taylor, 1 Esp. N. P. 117; Kirkman *v.* Newstead, 1 Esp. N. P. 117; Baker *v.* Jewell, 6 Mass. 460; recognized in Medbury *v.* Watson, 6 Met. 257; Blair *v.* Snover, 1 Halst. 153; Holland *v.* Weld, 4 Me. 255; Horbach *v.* Huey, 4 Watts, 455; Beach *v.* Hotchkiss, 2 Conn. 697. In Austin *v.* Walsh, 2 Mass. 401, A. & B. jointly consigned a cargo, directing the master to keep the proceeds till called on. Before the vessel returned, A. & B. agreed to divide, and the master subsequently paid A. his share. B. demanded his of the master, who refused, but offered to "pay the true owner." It was held that this would be construed as a direct promise to pay B., and that he might sue accordingly. So also Burn *v.* Morris, 3 Caines, 54.

(w) Pease *v.* Hirst, 10 B. & C. 122; Dobbin *v.* Foster, 1 Car. & K. 323. In Atkinson *v.* Laing, 1 Dowl. & R. N. P. 16, a contrary doctrine was held by Lord Tenterden; but see this case examined, *supra*, n. (q).

(x) Pease *v.* Hirst, 10 B. & C. 122; Wilsford *v.* Wood, 1 Esp. 182; where an incoming partner, whose entry had been antedated on the partnership deed, was not allowed to join in an action on a contract made prior to his entry, but subsequent to the date of the deed.

(y) Pease *v.* Hirst, 10 B. & C. 122. In this case, a note was made to A., B.,

§ 236. **Guaranty how affected by Change in Firm.** — Intimately connected with this topic is the question, how far a guaranty, bond of indemnity, and the like, are construed as covering matters subsequent to a change of the firm by the retirement or accession of a partner or partners; and when it ceases to have any operation after such change. We give the authorities on this subject in the note. (*z*) It will be seen that the general rule, as now estab-

C., D., & E., partners in a banking house, as security for advances to be made by them. A. and B. left the firm, and new members entered it; and advances were also made by the new firm. The note was handed by the old firm to the new, but not indorsed. An action thereon by the old firm for the new advances was held rightly brought by them, and by them only; the security covering the new advances being evidently intended to be a continuing one.

(*z*) The earliest case is that of Wright *v.* Russell, 3 Wils. 532. Here a bond, conditioned for the faithful service of W. Baird as clerk, was made to the plaintiff, Wright. Wright subsequently took a partner. Baird then left his service, but re-entered that of the new firm; and, while in their service, committed a breach of trust by embezzling the money of the firm. In an action of debt on the bond, judgment was given for the defendant; De Grey, C. J., saying: "The law is, that a surety shall not be bound beyond the terms of his engagement, as understood at the time he entered into it. Here Wright, by his own act, takes in a partner. From that moment the suretyship is at an end. If there is one, there may be twenty partners taken in. Is the surety liable if Baird disobeys the orders of any one of these partners? Or can the surety be called upon to insure the money of all of the partners? Certainly not." In Barclay *v.* Lucas, 1 T. R. 291, however, Lord Mansfield held, that bonds of this nature were given to the house, and not to the individual; and that, therefore, they extended the application of the bond to a new firm, if the old name was preserved. In this case, considerable reliance was placed on the recital by which the partners were to take the clerk into their employ, "in their shop and counting-house." And, in another case, it was admitted to be the common understanding among merchants, that the firm, and not the individual partners were meant to be guaranteed from loss: per Mansfield, C. J., in Weston *v.* Barton, 4 Taunt. 673. But the case of Barclay *v.* Lucas, seems clearly not law. In Barker *v.* Parker, 1 T. R. 287, where the bond guaranteed faithful service to "A. B., and his executors," Lord Mansfield held that this did not cover breaches committed by the clerk while in the service of the executors of A. B., who kept on in the same business after the death of their testator. He attempted to sustain Barclay *v.* Lucas, by the distinction that the change in that case was only by the accession of a new partner, the old firm still continuing. But this distinction is expressly against the case of Wright *v.* Russell, *supra*, and must fall with the case of Barclay *v.* Lucas, which rests solely upon it, if the case of Wright *v.* Russell be law. Of this there is now little doubt. In Myers *v.* Edge, 7 T. R. 254, Lord Kenyon said: "I very much approve of the case from Wilson;" and decided the case before him on its authority. Story, Part. § 250, note 3, says: "Barclay *v.* Lucas was a case which was supposed to contain language importing a provision of this [a continuing] character; but great doubts may well be entertained whether the case can be maintained upon any such interpretation." So in Weston *v.* Barton, 4 Taunt. 673, it was said by Mansfield, C. J.: "The propriety of Barclay *v.* Lucas has been very much questioned." In this last case, the condition was for repayment to five bankers of any money advanced by these five, or any or either of them; and it was held, that even this did not cover advances made by the survivors after one had died, Mansfield, C. J., saying: "There may be many very good reasons for such a construction. It is very probable that sureties may be induced to enter into such a

lished, is that such change discharges a bond of indemnity. And the principle is applied with equal force to simple guaranties. (*a*) And on the same ground any change in a firm materially altering its character discharges the surety, although the members of the firm remain unchanged. (*b*) So where there is an alteration, by removal or accession, in the parties whose conduct is guaranteed, the bond is discharged of farther operation. (*c*) And a contract with an ostensible partner, which has particular reference to his individual skill, has been held not to survive to the dormant partner. (*d*)

From the cases cited in the notes to the last paragraph and from the nature of partnership, we should draw the general conclusion, that a bargain with a firm expires with the dissolution of the firm, or with any change in it, and is not assignable or transferable by the firm to one of the partners, or to a stranger. For this the obvious reason may be given, that any contract with a firm may be supposed to be made with the persons composing it, because they are partners. It may be impossible to say that the bargain was made on the credit, pecuniary or moral, of this one or that one. The party has a right to say that he made it with all, because they were all there, and each contributed what he did, whether of money, skill, or character.

§ 237. **Parties to Formal Contracts.** — Only those who are

security by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things, there cannot be a partnership, consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be that the partner dying or going out is the very person on whom the sureties relied." The same was held in Arlington *v.* Merrick, 2 Saund. 412; Strange *v.* Lee, 3 East, 484.

(*a*) Myers *v.* Edge, 7 T. R. 254; Spiers *v.* Houston, 4 Bligh, N. S. 515; *Ex parte* Kensington, 2 Ves. & B. 79; Holland *v.* Teed, 7 Hare, 50. So in *Ex parte* McGee, 9 Ves. 697, an agreement to pay bills into a banking-house was held discharged by the bankruptcy of the partners, and an action was held, to lie against the assignees in bankruptcy for bills paid subsequently to that event. In the case of Dry *v.* Davy, 10 A. & E. 30, it was even held that the retirement of a dormant partner put an end to a guaranty. If the dormant partner was not known to the guarantor, she could only claim that the guaranty was at an end because she had contracted with the partners in interest, and not in name merely. This position, however, does not bring the case within the reason of personal confidence reposed actually, or by legal intendment, in the known members of the firm, as assigned by Lord Mansfield in Weston *v.* Barton, *supra*, and followed in Arlington *v.* Merrick, and Strange *v.* Lee, *supra*; and the authority of this case, therefore, finds no support in those.

(*b*) Thus, in Dance *v.* Girdler, 1 Bos. & P. N. S. 34, the incorporation of the obligees had this effect.

(*c*) Simson *v.* Cook, 1 Bing. 452; Univ. of Cambridge *v.* Baldwin, 5 M. & W. 580; Bellairs *v.* Elsworth, 3 Camp. 53; Russell *v.* Perkins, 1 Mass. 368; London Ass. Co. *v.* Bold, 6 Q. B. 514.

(*d*) Robson *v.* Drummond, 2 B. & Ad. 303. And see Stevens *v.* Benning, 1 Kay & J. 168, 6 De G., M. & G. 223.

named as parties in contracts under seal can sue upon such contracts. (*e*) But it has been held, that where a deed was made to a partnership by the name of the firm, the then existing partners might sue upon it, and parol evidence was admitted to show who those were. (*f*) And in another case a bond to the trustees of a trading company, to secure the faithful services of a clerk, was held to remain in full force so long as the clerk acted in that capacity, notwithstanding the fluctuations of the company. (*ff*) Where the partners have substituted a deed for a simple contract, the latter is merged in the former, and those only who are parties to the deed can sue upon it. (*g*)

The same limitation of the parties to the action to those whose names appear on the instrument prevails in the case of negotiable paper, and all those parties must sue. (*h*) If the note be indorsed in blank, then, of course, all or any of the partners may sue thereon. (*i*)

§ 238. **Parties to Simple Contracts.** — If a simple contract be made with one partner for the benefit of the firm, it may be sued by all, (*j*) and cannot be sued excepting by all the partners,

(*e*) Cabell *v.* Vaughan, 1 Saund. 291, *f*; Metcalfe *v.* Rycroft, 6 M. & S. 75; Vernon *v.* Jefferys, 2 Str 1146; Lefevre *v.* Boyle, 3 B. & Ad. 877; Ehle *v.* Purdy, 6 Wend. 629; Petrie *v.* Bury, 3 B. & C. 354; *Ex parte* Williams, Buck, 13, 15, note; Scott *v.* Godwin, 1 B. & P. 74. Thus it is said, in Montague *v.* Smith, 13 Mass. 405: "When covenants are made by or between two or more parties, although the covenant be for the benefit of a third person, mentioned in the instrument, the action must, nevertheless, be brought by the parties."

(*f*) Moller *v.* Lambert, 2 Camp. 548; 1 Lindley on Part. 386.

(*ff*) Metcalf *v.* Bruin, 12 East, 400, 2 Camp. 422.

(*g*) Evans *v.* Bennett, 1 Camp. 303, note. "There has been no case where, the interest being the same as that secured by deed, it has been holden that assumpsit would lie," Lord Ellenborough, Schack *v.* Autorg, 1 M. & S. 574; but the interest intended to be secured by the two must be identical. See Twopenny *v.* Young, 3 B. & C. 208, and Dean *v.* Newhall, 8 T. R. 168; Solly *v.* Forbes, 2 Br. & B. 38.

(*h*) In actions on bills and notes, only the parties thereto can, but all these must, sue. Guidon *v.* Robson, 2 Camp. 302; Bawden *v.* Howell, 3 M. & G. 638; Pease *v.* Hirst, 10 B. & C. 122; Siffkin *v.* Walker, 2 Camp. 307; Whitney *v.* McKechnie, 1 Bosw. 427. In Boswell *v.* Dunning, 5 Harr. 231, because the note was indorsed in full to a firm, by the firm name, proof was required of the partnership.

(*i*) Ord *v.* Portal, 3 Camp. 239; Attwood *v.* Rattenbury, 6 J. B. Moore, 579; Machell *v.* Kinnear, 1 Stark. 499. But if it appear affirmatively, by the defendant, that the note was delivered to third persons, in the first place the plaintiffs must show a delivery to themselves by such holders. Id.

(*j*) Garrett *v.* Handley, 4 B. & C. 664; Alexander *v.* Barker, 2 Cr. & J. 133; Skinner *v.* Stocks, 4 B. & Ald. 437; Cook *v.* Seely, 2 Exch. 746; Halliday *v.* Daggett, 6 Pick. 359; Creel *v.* Bell, 2 J. J. Marsh. 309; Fortune *v.* Brazier, 10 Ala. 793; Stevens *v.* Lunt, 19 Me. 70; Wright *v.* Williamson, 2 Penn. 978; Pearson *v.* Parker, 3 N. H. 366. [Beakes *v.* Da Cunha (N. Y.), 27 N. E. 251.] This is, indeed, the case in all implied contracts that arise in the course of the partnership business; for, as the implied promise must follow

unless there be some express language or circumstances which make it a bargain with one only; (*k*) whereas such contracts, in cases where the parties to be benefited and the one making the contract do not stand in the relation of partners, may generally be sued either by the party whose name is used, (*l*) or by the parties actually interested, though their names be not used. (*m*) But this differs from the case supposed in the last paragraph, thus: A promise to a present firm, with the understanding that others may come in and profit by it, is still no bargain with those others. They are not known, and are indeed uncertain as yet. But a bargain with one of a firm for the interest and benefit of all the firm is a present bargain with all the firm. And thus the rule remains good that those, and only those, with whom the bargain is made can sue upon it. The exception where a bargain is made under seal with one for the interest and benefit of others, in which case only those named as parties can sue, arises from the peculiar law of specialties, which prevents any persons not named from coming in as parties.

the consideration, it is raised to the firm from whom the consideration moves. Boggs *v.* Curtin, 10 S. & R. 211; Lee *v.* Gibbons, 14 S. & R. 111; Ulmer *v.* Cunningham, 2 Me. 118, 119; Addison on Cont. 743; 1 Pars. on Cont. (5th ed.) 26.

(*k*) Sims *v.* Bond, 5 B. & Ad. 389; Garrett *v.* Handley, 3 B. & C. 462; Oliver *v.* Burton, 17 Q. B. 989; Warner *v.* Griswold, 8 Wend. 665; Platt *v.* Halen, 23 Wend. 456; Ewing *v.* French, 1 Blackf. 353; Ward *v.* Leviston, 7 Blackf. 466; Doremus *v.* Seldon, 19 Johns. 213; Burn *v.* Morris, 3 Caines, 54; Munroe *v.* Ezzel, 11 Ala. 603. Thus, in Wood *v.* O'Kelly, 8 Cush. 406, where the question whether a mesmeric doctor should join as coplaintiff, in an action for medical services, his partner, the woman who slept in the clairvoyant state, and with whom he divided the net profits after paying expenses, the court below ruled, that, if the woman was a silent partner, she need not be joined. In the court above, it was not necessary to consider the question. The court, however, said: "It is not necessary that a dormant partner should be joined with the ostensible partners of a firm, in an action against a person who dealt only with the ostensible partners."

(*l*) Ward *v.* Leviston, 7 Blackf. 466; Rodwell *v.* Ridge, 1 C. & P. 220; Skinner *v.* Stocks, 4 B. & Ald. 437; Desher *v.* Holland, 12 Ala. 513; Warner *v.* Griswold, 2 Wend. 665; Lapham *v.* Green, 9 Vt. 407; Curtis *v.* Belknap, 21 Vt. 433; Sims *v.* Bond, 5 B. & Ad. 393; Colburn *v.* Phillips, 13 Gray, 64, 66; Sims *v.* Brittain, 4 B. & Ad. 375.

(*m*) Arden *v.* Tucker, 4 B. & Ad. 815; Rodwell *v.* Ridge, 1 C. & P. 220; Lapham *v.* Green, 9 Vt. 407; Cothay *v.* Fennel, 10 B. & C. 671; Alexander *v.* Barker, 2 Cr. & J. 133, 138; Robson *v.* Drummond, 2 B. & Ad. 303, 307, 308, per Parke and Littledale, JJ.; Stacy *v.* Decey, 2 Esp. 169, n.; Skinner *v.* Stocks, 4 B. & Ald. 437; Garrett *v.* Handley, 4 B. & C. 664; Curtis *v.* Belknap, 21 Vt. 433; Creel *v.* Bell, 2 J. J. Marsh. 309; Pitts *v.* Mower, 18 Me. 361; Story on Agency, § 160, and cases cited; Halliday *v.* Doggett, 6 Pick. 359; Ward *v.* Leviston, 7 Blackf. 466; Edmund *v.* Caldwell, 15 Me. 340. But the party for whose benefit the contract was made must also be the one from whom the consideration moves, or he can maintain no action, Mellen *v.* Whipple, 1 Gray, 317, 321, 322; Colburn *v.* Phillips, 13 Gray, 64, 66; with one or two well-defined exceptions, Id.

But where a written but not sealed contract is entered into with one partner, it not appearing on the face of the contract that he was acting on behalf of the firm, he may sue alone, on that contract. In such a case, the action may be maintained either in the name of the person with whom alone the contract was ostensibly made, or in that of the parties who can be shown to be really interested. (*n*)

§ 239. **Contracts of Insurance.** — Partnership contracts for insurance are governed by the same rule, that those, and only those, by whom the bargain is made can sue upon it, excepting so far as the rule is modified by the law of insurance, which, under certain circumstances, permits persons by whose authority and for whose benefit a policy is made, to sue, although their names are not mentioned. (*o*) By that law, the persons named in the policy may sue, and they alone can sue, unless the policy is made "for all whom it may concern," or contains other general words of equivalent import. (*p*) The reason of this is, that the insurers are entitled to know whom they insure, or else to know that they insure unknown persons, that they may make their terms accordingly. (*q*) An insurance by one partner in his own name and without general words, although on property belonging to the firm, covers only his interest, and the firm cannot maintain an action on such a policy. (*r*) Whether the partner insured, in an action for the whole loss, averring in his declaration an entire interest, can upon proof of the firm ownership recover any thing, and, if any thing, whether his *pro rata* share only, or the whole, has been variously decided. Some of the cases, including a decision of the United States Supreme Court, given by Marshall, C. J., which is entitled to the highest respect, holding that he cannot recover at all; (*s*) others, that he may to the extent of his interest

(*n*) Curtis *v.* Belknap, 21 Vt. 433. And see Skinner *v.* Stocks, 4 B. & Ald. 437; Cothay *v.* Fennell, 10 B. & C. 671; per Littledale, J., in Robson *v.* Drummond, 2 B. & Ad. 303; Phillips *v.* Pennywit, 1 Ark. 59.

(*o*) Grove *v.* Dubois, 1 T. R. 112; Cumming *v.* Forrester, 1 M. & S. 497; Hagedorn *v.* Oliverson, 2 M. & S. 426; 2 Pars. on Maritime Law, 29, and note 3.

(*p*) Finney *v.* Bedford Com. Ins. Co., 8 Met. 348; Turner *v.* Burrows, 5 Wend. 541; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72; Finney *v.* Warren Ins. Co., 1 Met. 16; 1 Phillips on Ins. §§ 391, 392; 2 Duer on Ins. § 20; Graves *v.* Boston M. Ins. Co., 2 Cranch, 419.

(*q*) Dumas *v.* Jones, 4 Mass. 647.

(*r*) Graves *v.* Boston M. Ins. Co., 2 Cranch, 419; Pearson *v.* Lord, 6 Mass. 81; Turner *v.* Burrows, 5 Wend. 541. See also Bell *v.* Ansley, 16 East, 141; Hibbert *v.* Martin, 1 Camp. 538; Cohen *v.* Hannam, 5 Taunt. 101; Lawrence *v.* Sebor, 2 Caines, 203.

(*s*) In Graves *v.* Boston M. Ins. Co., 2 Cranch, 419, it was held, that a partner insuring for an individual and entire interest can recover nothing, but must suffer a nonsuit, on its appearing that he was

as a partner; (*t*) and others still, that he may recover the whole loss. (*u*)

§ 240. **Novation.** — There is no doubt that a contract made with a firm, and therefore with all the members of a firm, may be exchanged for any other by the act or consent of all the parties. Thus, a sale is made to a firm, who owe for it. But the merchandise is transferred by the firm to one partner, who agrees to pay for it. By this alone the obligation of all the partners is not in the slightest degree affected. But if the seller, upon being applied to, consents to the arrangement, and agrees to discharge the firm and take this partner alone as his debtor, the arrangement would be valid in law, although some doubt might arise from the fact that, as this partner was already bound with all the rest, his new promise is no consideration for the discharge of the rest. By the principle of novation, if the new debtor is altogether a new person, his promise is sufficient consideration; and, as the separate promise of a partner would bind his separate property to this debt (we shall presently consider the question whether partnership debtors can claim any of the private property of partners until their private debts are discharged), we should incline to believe that this would be consideration enough. (*w*)

Where no objection of this kind comes in, it is certain that such a transfer would be effectual; (*x*) as if a sale were made by a firm and the debts transferred to one partner, and the debtor, being discharged by the other partners, agreed to pay that one; (*y*) or if a guaranty were made to a firm, and transferred to one partner; or made to one partner, and by him transferred to a firm; and the guarantor, for any sufficient consideration, agreed to the transfer.

§ 241. **Remedies for Torts.** — It is plain that there may be torts against a firm jointly, as well as against any or all the partners. And there is no reason why the firm may not as such sue the

only jointly interested in the property; the loss being a joint one, which he could neither insure nor recover for separately, either in whole or *pro rata*. The same doctrine is held in Cohen *v.* Hannam, 5 Taunt. 101, denying the authority of Page *v.* Fry, 2 B. & P. 240.

(*t*) Dumas *v.* Jones, 4 Mass. 647; Turner *v.* Burrows, 5 Wend. 541; Page *v.* Fry, 2 B. & P. 240; Irving *v.* Excelsior Fire Ins. Co., 1 Bosw. 507; Murray *v.* Col. Ins. Co., 11 Johns. 302, 311.

(*u*) In Horn *v.* Clarkson, 1 Caines, 276, and Lawrence *v.* Sebor, 2 Caines, 203, the courts admit a recovery in such case for the entire value insured. [For the effect upon a policy of insurance on partnership property of a transfer of a partner's interest, see *ante*, § 180.]

(*w*) See *ante*, § 235, note (*p*); note (*y*).

(*x*) See *ante*, § 235, note (*p*).

(*y*) Cook *v.* Beech, 10 Humph. 412; Degroot *v.* Darby, 7 Rich. 117; Howell *v.* Reynolds, 12 Ala. 128.

wrong-doer at law. (*z*) But the rule would doubtless be strictly applied, that damages could be recovered only for the joint injury sustained. (*a*) Thus an action would lie for seducing away one in their employ, (*b*) for turning any business from them by fraud and falsehood, or for any fraud against the whole firm, or for slander of them as merchants, (*c*) or for conversion of the property of the firm; (*d*) or, indeed, for any injury wrongfully inflicted, whether by negligence or with wrongful intent. (*e*) So, too, if an injury affected two or more members of a firm jointly, and not the rest, those who were jointly injured could sue jointly. (*f*) [1]

(*z*) Addison *v.* Overend, 6 T. R. 766; Cabell *v.* Vaughan, 1 Wms. Saund. 291, *m.* and notes; Glover *v.* Austin, 6 Pick. 209; Bloxam *v.* Hubbard, 5 East, 407; Cooke *v.* Bachellor, 3 B. & P. 150; Foster *v.* Lawson, 3 Bing. 452; Taylor *v.* Church, 8 N. Y. 452, 1 E. D. Smith, 479; Sewall *v.* Catlin, 3 Wend. 291; Patten *v.* Gurney, 17 Mass. 186, followed in Medbury *v.* Watson, 6 Met. 246, 257, 258. A dormant partner may join in trover. Robinson *v.* Mansfield, 13 Pick. 139. The rule is often laid down that partners *may* join in an action *ex delicto* for an injury affecting their joint interest. Best, J., in Foster *v.* Lawson, 3 Bing. 455. It is more correct to say that they *must.* Patten *v.* Gurney, 17 Mass. 185; cases cited *supra;* Ward *v.* Brampston, 3 Lev. 362. If they do not join, it can, however, only be taken advantage of by plea in abatement. Deal *v.* Bogue, 20 Pa. 228; Gibson *v.* Stevens, 7 N. H. 352, 358; 1 Chitty Pl. 65; Gow on Part. 136; Pickering *v.* Pickering, 11 N. H. 141; Nightingale *v.* Scammell, 6 Cal. 506; Anonymous, W. Jones, 253. Or the court may abate the writ *ex officio.* Hart *v.* Fitzgerald, 2 Mass. 509.

(*a*) Barratt *v.* Collins, 10 J. B. Moore, 446; Haythorn *v.* Lawson, 3 C. & P. 196; Pechell *v.* Watson, 8 M. & W. 691. Thus in Garland *v.* Noble, 1 J. B. Moore, 187, it was held, that on a submission to arbitration of all matters in dispute between a partnership and an individual, only the joint claims of the firm were in issue. The same was the case in Barratt *v.* Collins, *supra.* See the cases in note (*h*), *infra.*

(*b*) Story on Part. § 258.

(*c*) Lewis *v.* Chapman, 19 Barb. 252, where a postscript to a letter saying "*confidential;* had to hold over a few days for the accommodation of L. & H.," was held libellous if false, when addressed to the creditors of L. & H.; but held in the Court of Appeals to be for the jury to determine as a question of interest, 16 N. Y. 369; Foster *v.* Lawson, 3 Bing. 452; Cooke *v.* Bachellor, 3 B. & P. 150; Sewall *v.* Catlin, 3 Wend. 291; Haythorn *v.* Lawson, 3 C. & P. 196; Bumage *v.* Prosser, 4 B. & C. 247; Williams *v.* Beaumont, 10 Bing. 270; Taylor *v.* Church, 1 E. D. Smith, 279, 8 N. Y. 452; Le Fanu *v.* Malcomson, 1 H. L. Cas. 637. In this last case, a charge of cruelty to employés was held an injury to the firm in their trade, for which they could sue jointly. See also Davis *v.* Davis, 1 Nott & McC. 290; Backus *v.* Richardson, 5 Johns. 483, 485; Ware *v.* Clowny, 24 Ala. 707; Babonneau *v.* Farrell, 15 C. B. 360.

(*d*) In trover or trespass for injuries to the joint property, the partners can (and must) join. Wilson *v.* Comine, 2 Johns. 280; Patten *v.* Gurney, 17 Mass. 185, 187, per Parker, C. J.,; Glover *v.* Austin, 6 Pick. 209.

(*e*) Weller *v.* Baker, 2 Wils. 414, 423; Patten *v.* Gurney, 17 Mass. 185; Medbury *v.* Watson, 6 Met. 257, 258. Thus case lies by a firm against an officer if he improperly give up property attached at their suit. Commercial Bank *v.* Wilkins, 9 Me. 28.

(*f*) This question seems most gen-

[1] One partner cannot sue individually for a tort which causes injury to the firm business. Bigelow *v.* Reynolds, 68 Mich. 344, 36 N. W. 95. And where a firm sues for a tort, for instance a libel, committed upon it, the damages recovered can only be

§ 242. **Damages Recoverable.** — It might not always be easy to draw the line between damages, which were recoverable in such an action, because they were joint, and those which were not recoverable, because they were not joint. (*g*) Thus, if a libel charged insolvency or dishonesty upon any one partner, he, of course could sue; but, in strict law, he could not recover in this several suit for any damage done to the firm of which he was a member, and not even, we should say, for his share of this damage. For this the firm must sue, and, in this suit, they could recover only for the damage all sustained jointly. (*h*)

erally to have arisen where the joint property has been seized or sold and delivered, on execution against one partner, for his separate debt. In fact, it would seldom arise in any other way, except perhaps in the case of collusion between one partner and some third party, to slander or defraud the firm; since the injury, to admit of a joint action as partners by two or more members of the firm to the exclusion of another member, must touch them in their partnership property or interest in that property, and yet not affect the excluded partner, by reason of the act by which the injury is caused being justifiable as to him, or one for which he is responsible. In many of the States, it is held, that the sheriff may seize, and deliver to the purchaser the specific property of the firm, and that the purchaser thereby becomes tenant in common with the other partners of that property: as in Maine, New York, Alabama, Iowa, Illinois, North Carolina, Texas, Michigan, Ohio, New Jersey. So in England; but see next chapter. In case, therefore, the purchaser should undertake to convert the property by a destruction of it, or, as is held in some courts, by a sale, trover would lie against him, as against any tenant in common, by the other partners excluding the debtor partner. Wilson *v.* Reed, 3 Johns. 175; Mayhew *v.* Herrick, 7 C. B. 229, per Maule and Cresswell, JJ.; White *v.* Osborne, 21 Wend. 72; Hyde *v.* Stone, 7 Wend. 354.

(*g*) In trover by one partner against a sheriff who has sold the whole property on a levy, for the separate debt of the copartner, in the absence of precise proof of his interest the partner may recover a moiety, Walsh *v.* Adams, 3 Denio, 125; Deal *v.* Bogue, 20 Pa. 228; or the proportion of his original interest in the goods if this appear, Deal *v.* Bogue, 20 Pa. 228.

(*h*) One partner can recover for a libel on him in the way of his trade, although the libel also affects the firm. Harrison Bevington, 8 C. & P. 708; Robinson *v.* Marchant, 7 Q. B. 918; and even though the firm has already recovered for its injury through the same libel. Taylor *v.* Church, 1 E. D. Smith, 279. See Le Fanu *v.* Malcomson, 1 H. L. Cas. 637, where the libel referred to occurrences "in some of the Irish factories," and the plaintiff was allowed by innuendo to show that this was applied to himself, though his name did not appear therein. The question of damages being one for the jury, it was intimated by Coleridge, J., that where on the face of the declaration the damage is partly joint, and partly several, the course in such a case would be to limit the proof at the trial. Robinson *v.* Marchant, 7 Q. B. 923; Taylor *v.* Church, 1 E. D. Smith, 279, affirmed on error, 8 N. Y. 452; Foster *v.* Lawson, 3 Bing. 452. Perhaps the doctrine on this subject may be briefly stated thus: An action on such libel, either by the firm, or the single partner, or by both, will lie; both may declare without proof of special damage, and the jury will be presumed to have for injury to the firm business. Nothing can be recovered for injury to the feelings of the partners. Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. 397. The firm may sue and recover damages suffered by it by reason of a wrongful attachment of its property. Watts *v.* Rice, 75 Ala. 289.

Possibly the principle of exemplary damages, which, although called in question by high authority, is, we think, certainly admissible in some actions for tort, and, possibly in all, might come in aid of the plaintiff, and help to remove the difficulty. (*i*) If a third person colluded with a partner to defraud the firm, there would be very great difficulty in permitting the whole firm, including the fraudulent partner, to sue this third person; and, also, some difficulty in maintaining a suit by the other partners for the damage done to the firm. (*j*) This latter action, however, has been sustained, and we have no authority for supposing the former maintainable. But what damages could be recovered in such an action, whether all that the firm sustained, or only the proportion of the suing partners, we are not informed. (*k*) We should have said, that an action, by all the partners, including the fraudulent partner, and using his name only for the benefit of the innocent partners, and recovering, therefore, only the share of damage sustained by the innocent partners, (*l*) might have satisfied the justice of the case, and the technical rules of law, quite as well.

§ 243. **Equitable Relief.**—We know nothing in the law of partnership which limits the power of equity in giving the partnership relief against third parties. We mean, that in all cases of this kind, the same reasons for giving relief would be required, and the same selection of remedy, whether by injunction, discovery, specific performance, or otherwise as in similar cases which did not concern partnership. (*m*) There is, however, one question which has

confined themselves to the injury of the party plaintiff. If they allege special damage, the proof will be limited at the trial. If the libel be such that the respective injury cannot be distinguished, the defect must be specially demurred to. Injuries, however, to the personal feelings cannot of course be included in a joint suit by the firm. Haythorne *v.* Lawson, 3 C. & P. 196.

(*i*) Taylor *v.* Church, 1 E. D. Smith, 279, 8 N. Y. 452, and cases cited; and see Lewis *v.* Chapman, 19 Barb. 252. Also, see Symonds *v.* Carter, 32 N. H. 458; Cramer *v.* Noonan, 4 Wis. 231; Fry *v.* Bennett, 4 Duer, 247.

(*j*) Longman *v.* Pole, Moody & M. 223. In the Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 87, 92, Longman *v.* Pole was cited and affirmed; and it was even said by Watson, B.: "But it is clear that an ordinary partnership would have a right to maintain an action against one of its members for injury to their real or personal property, and for all wrongs done to them."

(*k*) By the analogy of cases in trover against sheriffs for sales of the entire property of the firm, it would seem that the extent of the recovery might be for tho shares of the innocent partners. But as the defendant is guilty of acquisition of the property by a fraud, though against the plaintiffs only, this would perhaps estop him from claiming any property thereunder; for the law would not permit him to divide his own fraud.

(*l*) See the preceding note.

(*m*) Hood *v.* Aston, 1 Russ. 416; Jervis *v.* White, 7 Ves. 413; Motley *v.* Dounman, 3 Mylne & Cr. 1; Knott *v.* Morgan, 2 Keen, 213; Small *v.* Atwood, Younge, 456; Fenn *v.* Craig, 3 Younge & C. 216; Clay *v.* Rufford, 8 Hare, 281; Douglas *v.* Horsfall, 2 Sim. & S. 184.

arisen, where a partnership has prayed for an injunction, to prevent a several creditor of a partner from interfering with the partnership property, which comes up as a question of the remedies of partnerships against third persons. It is, in fact, however, a question as to the rights and remedies of third persons against the partnership; and this general subject we will not proceed to consider, adding only to this section, that where the partnership is itself illegal, or where the action or the object of the action is illegal, no suit can be maintained by a partnership, any more, than it could be by an individual, under the same circumstances. (*n*) It has, however, been held that, when one partner seeks in equity a settlement of the partnership, the fact that the firm was established for a fraudulent purpose is no defence. (*nn*) But this is not certain.

(*n*) Biggs *v.* Lawrence, 3 T. R. 454, where the partnership was formed for smuggling.

(*nn*) Harvey *v.* Varney, 98 Mass. 118; but see Sampson *v.* Shaw, 101 Mass. 145.

CHAPTER X.

OF THE REMEDIES OF THIRD PERSONS AGAINST THE PARTNERSHIP AND AGAINST PARTNERS.

§ 244. **Appropriation of the Property to the Debts.**—The remedies of third parties against the firm and its members are generally the same as those which exist in relation to individuals. Similar actions at law, and similar suits in equity, with such variation as the nature of the case suggests and requires; similar attachment, whether direct or foreign attachment, or garnishee process, and similar levy and execution; but always subject to one modification or exception, which has caused much conflict and uncertainty in practice, and of which all the effects and all the rules are not yet determined. This exception arises from the fact that there may be creditors of the partnership, and creditors of the several partners; and the rights and claims of these two classes of creditors are conflicting.

In the days of Salkeld and Lord Raymond, one hundred and fifty years ago, the extreme inadequacy and incompleteness of the law of partnership are proved by the fact, that a creditor of a partner got at once by execution the share of the indebted partner in the partnership property. If there were two partners, — and at that time it would seem that there were seldom more, — a creditor of one got judgment and execution against him, and levied it upon the partnership property, of which the sheriff (although he seized the whole) sold one-half. If there were three, he sold one-third; if four, one-quarter. (*a*) The progress of the change is not very distinctly exhibited in the reports; but it began early, (*b*)

(*a*) Heyden *v.* Heyden, 1 Salk. 392; Jacky *v.* Butler, 2 Ld. Raym. 871; Mariott *v.* Shaw, Comyn, 277; Bachurst *v.* Clinkard, 1 Show. 169.

(*b*) It seems to have been received in the time of Lord Mansfield. In Fox *v.* Hanbury, Cowp. 445, the sale by the sheriff was limited to the share of the partner after the settlement of all the partnership accounts; to ascertain which, an account was taken on a reference before a Master in Chancery. But in Parker *v.* Pister, 3 B. & P. 288; Chapman *v.* Koops, 3 B. & P. 289, this equitable process by a court of law was emphatically refused by Lord Alvanly. See the history of the change, examined in *Ex parte* Smith, 16 Johns. 102, note; 3 Kent Comm. 65, note (*a*); Am. Jur., Oct. 1841, art. 3.

and it has long since been the well-established rule and practice, that no private creditor of a partner could take, by his execution, any thing more than that partner's share in whatever surplus remained after the partnership effects had paid the partnership debts.(c)

§ 245. **Nature of Interest of Partnership in its Property.** — There are two entirely distinct, and indeed opposite, ways of viewing a commercial partnership. One of them regards it as a modified tenancy in common; the other regards it as a modified corporation. It is certain that a partnership is neither a tenancy in common nor a corporation; and it is equally certain that it has some of the attributes and qualities of each of these forms of joint ownership. The question, which lies at the bottom of the difficulties presented by our present topic, seems to us to be this: Which of these two things does partnership most nearly approach?

Exactly so far as a partnership is a tenancy in common, it has no existence as a body by itself, and has no property, and no debts or creditors. Just so far as it is a corporation, it has an independent existence, and its own property, and its own debts. And precisely, as in recent times it has been found necessary, in this country, where so much business is done by corporations to impart to corporations many of the qualities of partnership; and just as during the difficult and tedious process of adjusting this new condition of joint ownership and joint action, many mistakes were made and much mischief done, until the just medium was found, and the reconciling principle which best protects the interests of all concerned; so, in reference to partnership, we apprehend that mischief has been caused by the difficulty of adjusting its true relation to a corporation, or, in other words, in determining the degree in which the law will acknowledge a voluntary mercantile

(c) Washburn *v.* Bank of Bellows Falls, 21 Vt. 278, 284; Matlock *v.* Matlock, 5 Ind. 403; Andrews *v.* Keith, 34 Ala. 722; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Murray *v.* Murray, 5 Johns. Ch. 60; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Smith *v.* Jackson, 2 Edw. Ch. 28; U. S. *v.* Hack, 8 Pet. 275; Moody *v.* Payne, 2 Johns. Ch. 548; *Ex parte* Smith, 16 Johns. 102; Walsh *v.* Adams, 3 Denio, 125; Lyndon *v.* Gorham, 1 Gall. 367; Tappan *v.* Blaisdell, 5 N. H. 193, per Richardson, C. J.; Gibson *v.* Stevens, 7 N. H. 352; Morrison *v.* Blodgett, 8 N. H. 244, 254; Newman *v.* Bean, 21 N. H. 93, Hill *v.* Wiggin, 31 N. H. 292; Church *v.* Knox, 2 Conn. 523; Witter *v.* Richards, 10 Conn. 41; Tilley *v.* Phelps, 18 Conn. 294; Rice *v.* Austin, 17 Mass. 206; Brewster *v.* Hammitt, 4 Conn. 540; Smith *v.* Barker, 10 Me. 458; Commercial Bank *v.* Wilkins, 9 Me. 38; Douglas *v.* Winslow, 20 Me. 89; Doner *v.* Stauffer, 1 Barr, 198; Deal *v.* Bogue, 20 Pa. 228; Greene *v.* Greene, 1 Ohio, 244; Place *v.* Sweetzer, 16 Ohio, 142; Sutcliffe *v.* Dohrman, 18 Ohio, 181; Winsten *v.* Ewing, 1 Ala. 29; Lucas *v.* Laws, 27 Pa. 211; Hubbard *v.* Curtis, 8 Iowa, 1, 14; Ridgway *v.* Clare, 19 Beav. 11; Ross *v.* Henderson, 77 N. C. 170.

partnership as a *quasi* independent body, and the consequences which it will derive from this acknowledgment.

We have no doubt whatever that the rule (now, as has been said, perfectly established), which shuts out the creditors of the several partners from the partnership property, until that has paid the partnership debts, is derived directly from this acknowledgment; and it would seem to be an inevitable consequence of any recognition of a partnership as a body by itself, having its own creditors and its own effects; and we are also confident that most of the difficulties which still embarrass this subject will be removed by a more distinct recognition, and more direct application, of the same principle.

§ 246. **Theory of Lien of Creditors on Partnership Property.** — Not many years since, there began, — perhaps not with Lord Eldon, but confirmed by him, (*d*) — a way of explaining the rights and determining the remedies of partners, by supposing a kind of lien on the partnership property, by the partners, and a kind of lien by the creditors on the partners' lien. This is not the language used; but, it is said, that partners have a lien on the property for the payment of the debts, and that creditors have a *quasi* lien, and by means of this, and through the lien of the partners, they worked out their effectual remedy against the property. (*e*)

(*d*) Lord Hardwicke held that a partner, or his representatives, had a specific lien upon the partnership stock for his surplus. West *v.* Skip, 1 Ves. Sen. 239. See Dodington *v.* Hallett, 1 Ves. Sen. 498, 499; by Lord Eldon, in *Ex parte* Younge, 2 Ves. & B. 242, because the parties were part-owners and not partners. The theory, as upheld by later authorities, is undoubtedly founded on the remarks of Lord Eldon, in *Ex parte* Ruffin, 6 Ves. 119, followed by *Ex parte* Williams, 11 Ves. 4. In the latter case, he said: "I have frequently, since I decided the case of *Ex parte* Ruffin, considered it, and I approve of that decision." "The grounds on which I went in *Ex parte* Ruffin were these: Among partners clear equities subsist, amounting to something like a lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions; or, if there is a deficiency, to call upon each other to make up that deficiency according to their proportions. But while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership." "But still, in either of these cases [dissolution by efflux of time, the death of one partner, the bankruptcy of one, or by dry, naked agreement], the community of interest remains; that is necessary, until the affairs are wound up; and that requires that what was partnership property before shall continue, for the purposes of a distribution, — not as the rights of the creditors, but as the rights of the partners themselves, require. And it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as, in the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution." Also, *Ex parte* Rowlandson, 2 Ves. & B. 173; *Ex parte* Fell, 10 Ves. 348. See Conwell *v.* Sandidge, 8 Dana, 278, 279.

(*e*) Story on Part. §§ 360, 361.

This theory is certainly obscure, and hardly capable of being definitely stated; nor does it appear to lead in any direct or distinct way to the result, for the sake of which it seems to have been constructed. There is no doubt that creditors of the firm have an equitable preference, or right, which courts of equity enforce. (*f*) But not much is gained by regarding this as a lien. (*ff*)

It seems to be admitted by Mr. Justice Story, who built upon this theory almost all the remedy of the creditors, that partners have no lien, unless in case of insolvency or dissolution; or, certainly, that the creditors do not get their *quasi* lien, unless in these cases. It is not easy to see how either insolvency or dissolution *creates* any lien, although, in these new circumstances, new rights arise, or, at least, are developed, and come into prominence, and the courts of equity recognize and enforce them. And this we suppose to be what is meant. (*g*)

(*f*) *Ex parte* Williams, 11 Ves. 6; *Ex parte* Ruffin, 6 Ves. 126, 127; *Ex parte* Kendall, 17 Ves. 526; Hoxie *v.* Carr, 1 Sumner, 181; *Ex parte* Rowlandson, 2 Ves. & B. 172; Appeal of York Co. Bank, 32 Pa. 446; Baker's Appeal, 21 Pa. 76; Doner *v.* Stauffer, 1 Pen. & W. 198; Wilson *v.* Loper, 13 B. Mon. 414; Jones *v.* Lusk, 2 Met. (Ky.) 356; Stout *v.* Fortune, 7 Iowa, 183; Campbell *v.* Mullett, 2 Swanst. 575; Cross on Lien, 198; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278. Authorities upon the point might be multiplied almost indefinitely. This is the recognized and decided law of all the New England States. Most of the other States have also recognized it; and no one has expressly denied its existence or obligation, so far as we know, with the exception of Pennsylvania and Georgia. See Witter *v.* Richards, 10 Conn. 37; Egberts *v.* Wood, 3 Paige, 517; McCulloch *v.* Dashiell, 1 H. & G. 96; Hall *v.* Hall, 2 McCord Ch. 302; Wooddrop *v.* Wards, 3 Desaus. 203; Smith *v.* Johnson, 2 Edw. 28; Commercial Bank *v.* Wilkins, 9 Me. 28. Further see Pearson *v.* Keedy, 6 B. Mon. 128; Black *v.* Bush, 7 B. Mon. 210; Ladd *v.* Griswold, 9 Ill. 25; Reese *v.* Bradford, 13 Ala. 837; Matlock *v.* Matlock, 5 Ind. 403; Miller *v.* Estill, 5 Ohio St. 508; Allen *v.* Centre Vale Co., 21 Conn. 130; Williams *v.* Gage, 49 Miss. 777; Gordon *v.* Kennedy, 36 Iowa, 167. In Pennsylvania, it was denied in Bell *v.* Newman, 5 S. & R. 78; *In re* Sperry, 1 Ashm. 347; and, in Georgia, in *Ex parte* Stebbins, R. M. Charlt. 77 (though this case was decided under a statute, and was exceptional in its circumstances); and questioned in Cleghorn *v.* Ins. Bank of Columbus, 9 Ga. 319. But it is now otherwise in both States. The right has been recognized in Pennsylvania, in Appeal of York Co. Bank, 32 Pa. 446, and other cases cited; and in Georgia, in Hoskins *v.* Johnson, 24 Ga. 625, 630, where it is called an equity. In the case of Burtus *v.* Tisdall, 4 Barb. 588, Strong, J., says: "It is clearly settled that the joint creditors have, then, the first *equitable claim* upon the whole, for the satisfaction of their debts." Sometimes the copartnership property is called a *trust fund* for the benefit of creditors; and sometimes it has been said that the copartnership creditors have a lien, or *quasi* lien, upon it. But whatever may be the exact nature and extent of these rights, it is certain that the joint debts have a claim of priority of payment out of the whole of the joint funds.

(*ff*) See Mayer *v.* Clark, 40 Ala. 259.

(*g*) If the private creditor levies on the joint property, and, on an account being taken to find the amount covered by the levy—viz., the debtor's share—if it appear that there is enough to satisfy both the joint and separate creditors, the former cannot be said to be preferred. If there is not enough to satisfy both, then there is

§ 247. **Theory of Legal Ownership by Partnership.**— We apprehend that there is a simpler view of this subject, which is at least equally efficient, and is open to no important objection. It is that which we have already intimated. A partnership is a legal body by itself; we do not say it is a corporation, because it wants some of the most essential elements of incorporation. But we say it is a body by itself, and is so recognized by the law for some purposes, and should be — always in a proper way and to a proper degree — for all purposes. And among these purposes is the placing of its relation to its creditors on the basis of contracting its own debts, and having its own creditors, and possessing its own property, which it applies to the payment of its debts. After this relation is exhausted, or after this work is done, there is a resolution of this body into its elements. Then come up the new relations between those who were the members of this body and those who were its creditors. If the joint debts have been so paid, in full, there are no joint creditors, and they who were partners own the remaining property, free from all encumbrance, except each other's rights, and they share this remainder between them. If the funds of the partnership were insufficient to pay its debts, they who were its members are now the debtors of those who were before only the creditors of the partnership; and, like other debtors, must pay their debts by whatever means they can. (*h*)

an insolvency, and the joint creditors are preferred. So, in the case of marshalling of assets. This, therefore, seems to be the sense in which the numerous cases are to be taken which admit the equitable lien only in case of insolvency. Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Hubbard *v.* Curtis, 8 Iowa, 1; Jones *v.* Lusk, 2 Met. (Ky.) 356; Stout *v.* Fortune, 7 Iowa, 183; Burtus *v.* Tisdall, 4 Barb. 571; Pearson *v.* Keedy, 6 B. Mon. 128; Story Eq. Jur. § 676; Griffith *v.* Buck, 13 Md. 102; Campbell *v.* Mullett, 2 Swanst. 551. As the joint creditor has no lien or equity till dissolution and insolvency, any *bonâ fide* assignment prior thereto would seem to convert the joint into separate property, and removes it from the operation of the lien. Cross on Lien, 198; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3; Hunt *v.* Waterman, 2 R. I. 298; Smith *v.* Edwards, 7 Humph. 106; Miller *v.* Estill, 5 Ohio St. 508; Campbell *v.* Mullett, 2 Swanst. 575; *Ex parte* Fell, 10 Ves. 347; Griffith *v.* Buck, 13 Md. 102; Rogers *v.* Nichols, 20 Tex. 719; Stout *v.* Fortune, 7 Iowa, 183; Jones *v.* Lusk, 2 Met. (Ky.) 356; Holmes *v.* Hawes, 8 Ired. Eq. 21; Wilson *v.* Soper, 13 B. Mon. 414; Reese *v.* Bradford, 13 Ala. 846; *Ex parte* Peake, 1 Madd. 358. So where one partner sells out to another who assumes the debts. City of Maynoketa *v.* Willey, 35 Iowa, 323. See also Giddings *v.* Palmer, 107 Mass. 269. After dissolution, if one partner purchase the interest of the other, agreeing to assume the debts, he becomes the principal debtor, of whom the retiring partner is surety; and creditors of the firm, having knowledge of this equity, are bound to regard it in their subsequent dealings with the parties. Smith *v.* Shelden, 35 Mich. 42.

(*h*) Various attributes of a partnership favor this view. Thus, the *delectus personarum*, the necessity of a joint suit by or against them, the doctrines of equitable

§ 248. **How far Recognized at Law.** — The law does not now make this recognition in the plain and simple way we have stated, and drawn from it all those inferences to which it would seem to lead. Thus, long after it was established that the creditors of the partnership had a priority of right to the partnership effects over private creditors of the partners, it was quite as well established that the creditors of the partnership could levy upon the private effects of the partners, just as freely as their private creditors could; thus giving to the creditors of the partnership a double charge, — priority in one respect, and equality in the other. It seems, however, to have become a rule in the settlement of bankrupt and insolvent concerns, to apply a more just and reasonable principle; namely, to give to the creditors of the partnership all the effects of the partnership if necessary for their debts, leaving only the surplus, if these debts were paid to the private creditors; and to give to the several private creditors the private assets of the several partners, applying only the surplus to the debts of the partnership. (*i*) There was some fluctuation back and forth; but this principle finally prevailed in England, and, as almost all insolvencies were settled there in chancery, this may be considered as their method of settling such estates. (*j*)

preference, and of the joint and several liability of partners, are well explained on this basis, without resorting to the theory of *quasi* and dependent lien. In many of the cases involving the claims of the joint creditors on the partnership fund, the word "lien" is not used, but the right of the partnership creditor is termed a trust; and, in some cases, is held operative directly on the fund, and not through the medium of the partner's lien. Tillinghast *v.* Champlin, 4 R. I. 173; Burtus *v.* Tisdall, 4 Barb. 571, 588.

(*i*) This was first held in A. D. 1715, in *Ex parte* Crowder, 2 Vern. 706; followed by *Ex parte* Cooke, 2 P. Wms. 500.

(*j*) The older rule in bankruptcy, giving a full satisfaction out of the separate estate to the separate creditors, was first broken in upon by Lord Thurlow, in *Ex parte* Hayden, 1 Bro. Ch. 454, which introduced the important modification that the separate estate might be had recourse to, by the partnership creditors, whenever there was neither joint estate nor a solvent partner. This somewhat anomalous rule, making the nature of the debt depend on the presence or absence of joint assets (see per Lord Eldon, in *Ex parte* Pinkerton, 6 Ves. 814, note), seems farther to have been extended, by Lord Thurlow in *Ex parte* Hodgson, 2 Bro. Ch. 5, to an absolute equality as to the separate estate between the joint and separate creditors; and apparently, this continued to be the rule till the decision of Lord Rosslyn in *Ex parte* Elton, 3 Ves. 238, A. D. 1796, when the principle of the old rule of exclusive satisfaction of the separate creditors from the separate estate —the partnership creditors coming in only for the surplus—was restored, and was followed for some time. *Ex arte* Clay, 6 Ves. 813; *Ex parte* Kensington, 14 Ves. 448. For the history of this fluctuation, see Allen *v.* Wells, 22 Pick. 453; Bardwell *v.* Perry, 19 Vt. 292, where it is concisely set forth; Murray *v.* Murray, 5 Johns. Ch. 60, where it is given at greater length. The earlier rule, restricting the joint creditors from recourse to the separate estate, was adopted from bankruptcy into equity, receiving only the modifica-

In this country there were some, but rather faint, attempts to establish the same principle. Recently these have been renewed with more vigor and more success. And we believe that a principle which is so obviously just and reasonable and consistent with the true theory of partnership, will before long be settled and established with us. (*k*)[1]

tion that if no joint estate subsisted, and there was no solvent partner, the firm creditors might come upon the separate fund *pari passu* with the separate creditors. See accordingly Cowell *v.* Sikes, 2 Russ. 191; Gray *v.* Chiswell, 9 Ves. 118; *Ex parte* Kendall, 17 Ves. 514. In Gray *v.* Chiswell, it was decided expressly that separate creditors were entitled to be paid first out of the separate fund, if there was any joint fund, however small, for the joint creditors to follow; Lord Eldon remarking that it was the first time the case had been presented in equity, though in bankruptcy the question was familiar. But in Devaynes *v.* Noble, 1 Meriv. 529, 562, 564, it was held by Sir William Grant, that though the common law had, unlike the law-merchant, made all partnership contracts joint, equity, following the law-merchant, would hold them several, by operating through its jurisdiction to correct a mistake, to reform the contract. Hence, he held, that equity would admit a partnership creditor to come directly upon the separate estate, without regard to the accounts between the partner and his firm. His ruling was confirmed by Lord Brougham on appeal. 2 Russ. & M. 495. It had been already followed in Sumner *v.* Powell, 2 Meriv. 37; and since in Wilkinson *v.* Henderson, 1 Mylne & K. 582; also, in Thorpe *v.* Jackson, 2 Younge & C. 553, where it was held, that the same rule applied also to joint debtors not partners in trade. And this seems to be the undoubted law in England, Story Eq. Jur. § 676; Redfield, J., in Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; and, to some extent, in this country. But this rule is confined solely to cases where the partnership creditors seek to come upon the separate assets of one partner, and there are no competing separate creditors. See the cases cited accordingly; also, Hills *v.* M'Rae, 9 Hare, 297; Harris *v.* Farwell, 13 Beav. 403; Brett *v.* Beckwith, 3 Jur. N. S. 31. But if there are separate creditors, it seems to be the present equity doctrine that, as to equitable assets, if there be no joint fund or solvent partner, whether the separate estate be solvent or not, the separate creditors must first be satisfied out of their fund, and the joint creditors take only the surplus, if any. Ridgway *v.* Clare, 19 Beav. 311; Addis *v.* Knight, 2 Meriv. 117; Croft *v.* Pyke, 3 P. Wms. 112; while, if both estates are solvent, the joint creditors can come upon either; or, if the joint fund be solvent, and the separate insolvent, the joint creditors can follow the latter, as, by their payment, the separate estate has a credit to that amount in the joint estate, which the separate creditors can pursue. Ridgway *v.* Clare, 19 Beav. 311; *Ex parte* Sperry, 1 Ashm. 357; Walker *v.* Eyth, 25 Pa. 216; Lawrence *v.* Trustees of Orphan House, 2 Denio, 577; Patterson *v.* Brewster, 4 Edw. Ch. 352.

(*k*) The preference of the separate creditors, as a rule of equity, is affirmed by Chancellor Kent. Murray *v.* Murray, 5 Johns. Ch. 60; 3 Kent Comm. 65, citing Wilder *v.* Keeler, 3 Paige, 167; Morgan *v.* His Creditors, 20 Mart. (La.) 599; McCulloch *v.* Dashiell, 1 H. & G. 96; Payne *v.* Matthews, 6 Paige, 19; Hall *v.* Wood, 2 McCord Ch. 302; Bowden *v.* Schatzell, 1 Bailey Eq. 360; Cammack *v.* Johnson, 1 Green Ch. 163. The joint estate of a partnership is first liable for the joint debts, and the separate estate of the respective partners for their separate debts; and neither class has a right to go to the fund previously belonging to the other, until the creditors having preference are fully paid. *In re* McLean, U.

[1] We have seen (*ante*, § 178) that when a partner transfers his interest in the firm, the assignee gets no interest in the assets, but only the partner's right to a share of the

§ 249. **Suit by or against a Partnership.** — [At common law

S. Dist. Ct. 15 N. B. R. 333; Murril *v.* Neil, 8 How. 421; Bass *v.* Estill, 50 Miss. 300. So also see Patterson *v.* Brewster, 4 Edw. Ch. 352; Crockett *v.* Crain, 33 N. H. 452; North R. Bank *v.* Stewart, 4 Bradf. 254; Ganson *v.* Lathrop, 25 Barb. 455; Morrison *v.* Kentz, 15 Ill. 193; Hubbard *v.* Curtis, 8 Iowa, 1. Elsewhere the more modified doctrine is maintained, that the partnership creditors will be admitted *pari passu,* only when they have no joint fund, Bridge *v.* McCullough, 27 Ala. 661; Rodgers *v.* Meranda, 7 Ohio St. 179; Brock *v.* Bateman, 25 Ohio St. 609; or there is no solvent partner, Daniel *v.* Townsend, 21 Ga. 155.

net profits after an account is taken. If all the partners transfer their interests the transaction would seem to be the same. Whoever held the legal title, the beneficial interest would be in the firm, and none of the assignees would have any beneficial interest until the firm debts were paid and the accounts adjusted. The firm creditors would therefore lose nothing, as they should not, by the fact that all the partners instead of all but one, had sold out. Lord Eldon's theory of the *quasi*-lien of the firm creditors works out here, however, a startling and unjust result. Since by this theory the creditors have no rights except through the partners, it follows that if all the partners release their rights, the derivative rights of the creditors are gone. It is held that they do so release their rights when they all assign their interests. Case *v.* Beauregard, 99 U. S. 119; Goldsmith *v.* Eichold, 94 Ala. 116, 10 So. 80; Jones *v.* Fletcher, 42 Ark. 422; Young *v.* Clapp, (Ill.) 32 N. E. 187. *Contra,* Menagh *v.* Whitwell, 52 N. Y. 146.

The theory is carried so far that where the interests of all the partners or of the last partners having claims are sold out upon executions in favor of individual creditors, their "liens," and consequently the firm creditors' "*quasi*-liens," upon the firm property are gone. Jones *v.* Fletcher, 42 Ark. 422; Doner *v.* Stauffer, 1 Pen. & W. 198; Coover's Appeal, 29 Pa. 9.

This principle is invoked to establish the rights of joint creditors of the partners who are not firm creditors. If joint creditors of the partners bring suit and attach or seize on execution partnership property, later attaching partnership creditors cannot interfere; a reason given is that the partners cannot object, and therefore, partnership creditors have no right to do so. Hoare *v.* Oriental Bank, 2 App. Cas. 589 (*semble*); Hall *v.* Richardson, (N. H.) 20 Atl. 978; Saunders *v.* Reilly, 105 N. Y. 12, 12 N. E. 170; Davis *v.* Delaware & Hudson Canal Co., 109 N. Y. 47, 15 N. E. 873; Snodgrass's Appeal, 13 Pa. 471. See, to the same effect, Couchman *v.* Maupin, 78 Ky. 33; Citizens' Bank *v.* Williams, 128 N. Y. 77, 28 N. E. 33. *Contra,* Commercial Bank *v.* Mitchell, 58 Cal. 42.

Where one partner transfers the assets to his copartner a question arises of a different sort. There is in that case an intention to pass the property from the firm to the purchasing partner. Both parties acting together have power to convey firm property of any kind; and here therefore the legal title passes. The firm creditors have no more right to complain than the creditors of any debtor who has conveyed away his property; they can complain, that is, only when the conveyance is a fraud upon creditors. In the ordinary case, therefore, the firm creditors have no right to complain, and no claim upon the property transferred. Schleicher *v.* Walker, 28 Fla. 680, 10 So. 33; Stanton *v.* Westover, 101 N. Y. 265, 4 N. E. 529. And the same thing is true if the transfer is not to one of the partners, but to an individual creditor of a partner, or to a third party, provided all the the partners assent. See *post,* § 251, note (*q*). Young *v.* Clapp, (Ill.) 32 N. E. 187; Woodmansie *v.* Holcomb, 34 Kas. 35; 7 Pac. 603; Schmidlapp *v.* Currie, 55 Miss. 597; Fulton *v.* Hughes, 63 Miss. 61; Sexton *v.* Anderson, 95 Mo. 373, 8 S. W. 562; Pepper *v.* Peck, (R. I.) 20 Atl. 16. When one partner thus agrees

the partnership is not recognized as a person capable of being

that the other shall leave all the assets, and the latter agrees to pay the firm debts, this would seem to be a personal contract, and not to give the firm creditors any claim as such on the assets. Goembel *v.* Arnett, 100 Ill. 34; Parker *v.* Merritt, 105 Ill. 293 (*semble*); Trentman *v.* Swartzell, 85 Ind. 443; Vosper *v.* Kramer, 31 N. J. Eq. 420; Alpaugh *v.* Savage, (N. J.) 19 Atl. 380. In Indiana it is held that the firm creditors become individual creditors of the purchasing partner, and may share *pari passu* with his other individual creditors. Warren *v.* Farmer, 100 Ind. 593. But it is sometimes decided that the purchasing partner takes the assets in trust, and will be required to hold them for the partnership creditors. Bowman *v.* Spalding, (Ky.) 2 S. W. 911; Phelps *v.* McNeely, 66 Mo. 554. So in Virginia, where the agreement was to pay the debts "out of the assets." Shackelford *v.* Shackelford, 32 Gratt. 481. See also Parker *v.* Merritt, 105 Ill. 293.

If however the transfer leaves the firm insolvent, and no equivalent is obtained, the transfer would seem to be a fraud on the creditors; who in that case have a legal claim on the property conveyed. If one or both of the partners continue solvent, the creditors have a remedy, and the conveyance seems good. But if the firm and the partners are insolvent, the conveyance should be held fraudulent in law, whatever the intent of the parties. *Ex parte* Mayou, 4 De G. J. & S. 664; *Ex parte* Snowball, L. R. 7 Ch. 534; Goodbar *v.* Cary, 16 F. R. 316; Keith *v.* Fink, 47 Ill. 272; Smith *v.* Smith, (Ia.) 50 N. W. 64; Kelley *v.* Flory, (Ia.) 51 N. W. 181; Roop *v.* Herron, 15 Neb. 73, 17 N. W. 353; Caldwell *v.* Bloomington Mfg. Co., 17 Neb. 489, 23 N. W. 336; Morehead *v.* Adams, 18 Neb. 569, 26 N. W. 242; Clements *v.* Jessup, 36 N. J. Eq. 569, 572 (*semble*); Wilson *v.* Robertson, 21 N. Y. 587; Menagh *v.* Whitwell, 52 N. Y. 146; Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853; De Caussey *v.* Baily, 57 Tex. 665 (*semble*); Darby *v.* Gilligan, 33 W. Va. 246, 10 S. E. 400; Baer *v.* Wilkinson, 35 W. Va. 422, 14 S. E. 1; David *v.* Birchard, 53 Wis. 492, 10 N. W. 557; Keith *v.* Armstrong, 65 Wis. 225, 26 N.W. 445; Cribb *v.* Morse, 77 Wis. 322, 46 N. W. 126. See Davies *v.* Atkinson, 124 Ill. 474, 16 N. E. 899; or it should at least be held that a knowledge of the insolvency by the partners conclusively proves them to have been acting fraudulently in fact. Johnston *v.* Straus, 26 F. R. 57; Phelps *v.* McNeely, 66 Mo. 554; Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592.

It is held, however, by a strong body of authority that if the transfer was *bona fide* it holds, even if in fact the firm was insolvent. Case *v.* Beauregard, 99 U. S. 119; Huiskamp *v.* Moline Wagon Co., 121 U. S. 310; Coffin *v.* Day, 34 F. R. 687; Reynolds *v.* Johnson, 54 Ark. 449, 16 S. W. 124; Sickman *v.* Abernathy, 14 Col. 174, 23 Pac. 447; Allen *v.* Center Valley Co., 21 Conn. 130; Ellison *v.* Lucas, 87 Ga. 223, 13 S. E. 445; Hapgood *v.* Cornwell, 48 Ill. 64; Hanford *v.* Prouty, 133 Ill. 339, 24 N. E. 565; Purple *v.* Farrington, 119 Ind. 164, 21 N. E. 543; Poole *v.* Seney, 66 Ia. 502, 24 N. W. 27; Woodmansie *v.* Holcomb, 34 Kas. 35, 38, 7 Pac. 603 (*semble*); Howe *v.* Lawrence, 9 Cush. 553; Richards *v.* Manson, 101 Mass. 482; Hanover Nat. Bank *v.* Klein, 64 Miss. 141; Dimon *v.* Hazard, 32 N. Y. 65; Wilcox *v.* Kellogg, 11 Ohio, 394; Sigler *v.* Bank, 8 Oh. St. 511; Gallagher's Appeal, 114 Pa. 353, 7 Atl. 237; Carver Gin & Machine Co. *v.* Bannon, 85 Tenn. 712, 4 S. W. 831. A distinction is made in Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, between a conveyance with and one without knowledge of the insolvency; the latter only being upheld. And it is clear that if there is in fact a fraudulent intent the conveyance is voidable. Flack *v.* Charron, 29 Md. 311.

In New Hampshire firm property cannot be diverted from the debts of existing firm creditors, even by consent of all the partners. Kidder *v.* Page, 48 N. H. 380; Caldwell *v.* Scott, 54 N. H. 414. Though it may be applied to other purposes as against subsequent firm creditors. Farwell *v.* Metcalf, 63 N. H. 276.

A firm creditor who has secured a legal interest in the property, as by attachment, may of course hold it against any subsequent act, even an act in which all partners

sued; and it must sue and be sued in the names of the partners[1] And therefore in order to get a judgment which will bind all the partners, service must be made upon all. Service upon one partner is not enough,[2] though if one partner is sued, he is concluded by a judgment;[3] and since the partners are liable severally as well as jointly, if both partners are non-resident the property of one may be attached and made liable for the debts.[4] Where one partner dies pending suit, since firm debts survive, the action may proceed against the survivors without a bill of revivor;[5] and if a partner dies before suit is begun, the surviving partners alone must sue or be sued, without joining the representative of the deceased partner.[6]]

If the partnership is changed, whether by a former partner withdrawing, or a new one coming in, it is a general rule, that those persons who were partners when the contract was formed, whether it was express or implied, and they only, can sue upon the contract. (*ii*)

§ 250. **Suit in Partnership Name by Statute.** — [The position of a defendant firm has been much changed by statute. The most important form of statute is that allowing a firm to sue and be sued in the firm name.[7] Some such statutes allow judgment to be issued in this case only against the firm property, not against the partners individually;[8] and therefore when a married woman is member of a firm, there is no difficulty in suing the firm.[9]

(*ii*) Cunningham *v.* Munroe, 15 Gray, 471; Tay *v.* Ladd, 15 Gray, 296. But see Page *v.* Wolcott. 15 Gray, 536.

join. Schleicher *v.* Walker, 28 Fla. 680, 10 So. 33 (*semble*); Carter *v.* Galloway, 36 La. Ann. 473, 730; Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835.

When the property of the firm is fraudulently assigned to an individual creditor, the firm creditors may follow and take the goods. Hartley *v.* White, 94 Pa. 31. And where a partner conveys his own interest, though the legal title passes, the firm creditors may follow the goods. Conant *v.* Frary, 49 Ind. 530; Hiscock *v.* Phelps, 49 N. Y. 97; Morss *v.* Gleason, 64 N. Y. 204; Lewis *v.* Anderson, 20 Ohio St. 281; Cunningham *v.* Ward, 30 W. Va. 572, 5 S. E. 646.

[1] Lewis *v.* Cline, (Miss.) 5 So. 112; Dunham *v.* Shindler, 17 Ore. 256, 20 Pac. 326.

[2] Tabler *v.* Bryant, 62 Miss. 350.

[3] Hall *v.* Cook, 69 Ala. 87 (by statute).

[4] Daly *v.* Bradbury, 46 Minn. 396, 49 N. W. 190.

[5] Davis *v.* Davis, 93 Ala. 173, 9 So. 736; Bucki *v.* Cone, 25 Fla. 1, 6 So. 160; Dunman *v.* Coleman, 59 Tex. 199.

[6] Bassett *v.* Miller, 39 Mich. 133; Cragin *v.* Gardner, 64 Mich. 399, 31 N. W. 206; Nehrboss *v.* Bliss, 88 N. Y. 600; Dial *v.* Agnew, 28 S. C. 454, 6 S. E. 295; Watson *v.* Miller, 55 Tex. 289. See *post*, § 349.

[7] Stuart *v.* Corning, 32 Conn. 105. See U. S. Express Co *v.* Bedbury, 34 Ill. 459.

[8] Jackson *v.* Litchfield, 8 Q. B. D. 474 (C. A.); Clark *v.* Cullen, 9 Q. B. D. 355; Haralson *v.* Campbell, 63 Ala. 278; Watts *v.* Rice, 75 Ala. 289; O'Brien *v.* Foglesong, (Wyo.) 31 Pac. 1047.

[9] Yarbrough *v.* Bush, 69 Ala. 170.

After the firm assets have been exhausted, some means such as bringing suit on the judgment, against the members of the firm are provided for enforcing the partner's liability.[1] But the debt is merged in the judgment; and one who has ceased to belong to the firm before judgment is obtained cannot afterwards be reached. Only members of the firm against which the judgment is obtained can be held upon it, even secondarily.[2] In Kansas, however, a judgment against the firm in the firm name binds also all the partners who were served, and the property of either partner may be levied on.[3]

There seems to be no reason why the individual partners should not be joined in an action brought against the firm by name. In Louisiana a single partner may be joined with the firm.[4] And action may still be brought as at common law against the individual partners, with the same result of holding both firm and individual property.[5]

Another common form of statute provides that a firm may be bound by a judgment when only one partner is served with process. Such a judgment ordinarily binds the firm property, and the individual property of the member actually served.[6] This sort of statute has no extra-territorial force. Though it is recognized in another State as binding on the partner actually served, it will not be enforced against the firm property outside the State,[7] nor against a partner who was not served.[8]]

§ 251. **Residence of a Partnership.** — [Where a firm may be sued by name, can it be said to have a residence? Not at any rate in the United States courts, since in those courts, in spite of the State statutes, the partnership cannot sue and be sued by name. If the jurisdiction depends on citizenship, that of the partners must be alleged.[9] But it seems clear that a statute of this sort recognizes, at least for purposes of procedure, the true nature of a partnership as an entity; and that it should therefore

[1] Ruth *v.* Lowrey, 10 Neb. 260, 4 N. W. 977; Leach *v.* Milburn Wagon Co., 14 Neb. 106, 15 N. W. 232.

[2] Cambefort *v.* Chapman, 19 Q. B. D. 229.

[3] Stout *v.* Baker, 32 Kas. 113, 4 Pac. 141.

[4] Martin *v.* Meyer, 45 F. R. 435.

[5] Haralson *v.* Campbell, 63 Ala. 278; Watts *v.* Rice, 75 Ala. 289; Leinkauff *v.* Munter, 76 Ala. 194.

[6] Harford *v.* Street, 46 Ia. 594; Hedges *v.* Armistead, 60 Tex. 276; Texas & St L. R. R. *v.* McCaughey, 62 Tex. 271.

[7] Bowler *v.* Huston, 30 Gratt. 266.

[8] Conley *v.* Chapman, 74 Ga. 709.

[9] Adams *v.* May, 27 F. R. 907.

be recognized as having a residence distinct from that of the individual partners.[1]]

§ 252. **Exemption from Attachment or Execution.** — [Where a debtor whose property is attached, or an insolvent, is allowed to retain part of his property as exempt from execution, a partner cannot claim any part of the partnership property as so exempt; for the property belongs to the partnership, not to the partner.[2] Nor can the exemption be claimed by the partnership; for it is meant to protect individual debtors.[3]

There is nothing to prevent a division of the firm property by all the partners among themselves, if it is done in good faith. The property then becomes separate property of the partners.[4] If this is done for the express purpose of claiming an exemption, it would seem not to be *bona fide*, but a device to avoid creditors, and exemption should not be allowed.[5] Certainly after attachment or levy of execution it is too late to make such a division; the creditor has a prior lien, and the partners can claim no exemption.[6]

Similarly if all the firm assets are *bona fide* conveyed to one partner they become his individual property;[7] and he may therefore claim an exemption, though the firm is insolvent.[8]]

[1] Fitzgerald *v.* Grimmell, 64 Ia. 261, 20 N. W. 179.

[2] *In re* Corbett, 5 Sawyer, 206; Schlapback *v.* Long, 90 Ala. 525, 8 So. 113; Richardson *v.* Adler, 46 Ark. 43; Cowan *v.* Creditors, 77 Cal. 403, 19 Pac. 755; Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506 (*semble*); State *v.* Bowden, 18 Fla. 17; Smith *v.* Harris, 76 Ind. 104; *Ex parte* Hopkins, 104 Ind. 157, 2 N. E. 587; Pond *v.* Kimball, 101 Mass. 105; Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704; Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156; Wise *v.* Frey, 7 Neb. 134; Gaylord *v.* Imhoff, 26 Oh. St. 317; First Nat. Bank *v.* Hackett, 61 Wis. 335, 21 N. W. 280; McNair *v.* Rewey, 62 Wis. 167, 22 N. W. 339. But see *contra*, Blanchard *v.* Paschal, 68 Ga. 32; Skinner *v.* Shannon, 44 Mich. 86, 6 N. W. 108, even though the claimant has overdrawn his account: McCoy *v.* Brennan, 61 Mich. 362, 28 N. W. 129. For the same reason a minor heir of one partner cannot claim out of partnership property the allowance granted by statute before the payment of debts. Succession of Pilcher, 39 La. Ann. 362, 1 So. 929. Nor can a widow claim such allowance. Sellers *v.* Shore, 89 Ga. 416, 15 S. E. 494; Julian *v.* Wrightsman, 73 Mo. 569. Nor can a widow claim a statutory "exemption" in partnership property where her husband was a partner, so long as the partnership affairs are unsettled. Little *v.* McPherson, 76 Ala. 552. For exemption of partnership land see *post*, § 265, note 1.

[3] *In re* Blodgett, 10 N. B. R. 145; Guptil *v.* McFee, 9 Kas. 30; Pond *v.* Kimball, 101 Mass. 105; State *v.* Spencer, 64 Mo. 355; Russell *v.* Lennon, 39 Wis. 570.

[4] McKinney *v.* Baker, 9 Ore. 74; Weaver *v.* Ashcroft, 50 Tex. 427.

[5] Gill *v.* Lattimore, 9 Lea, 381. *Contra*, Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506; State *v.* Kenan, 94 N. C. 296.

[6] State *v.* Day, (Ind.) 29 N. E. 436; Wise *v.* Frey, 7 Neb. 134. *Contra*, Stout *v.* McNeill, 98 N. C. 1, 3 S. E. 915.

[7] Stanton *v.* Westover, 101 N. Y. 265, 4 N. E. 529; Miller *v.* Estill, 5 Oh. St. 508.

[8] Goudy *v.* Werbe, 117 Ind. 154, 19 N. E. 764; Burton *v.* Baum, 32 Kas. 641, 5 Pac. 3; Mortley *v.* Flanagan, 38 Oh. St. 401.

§ 253. **Right of Partnership Creditors to Proceed against the Partners.** — There is perhaps no great practical objection in permitting the creditors of the partnership to go at once for their payment to the partners personally, and their private property, where there is no insolvency of the partnership; because, if a partner is obliged to pay such a debt, he may charge his payment to the firm, and so be allowed it on the general settlement, or in account. This is the present rule and practice; each partner being liable *in solido*, although the whole partnership is solvent and accessible, and the action must be brought against all. (*l*)[1] But it would be more consistent with the true theory, and in all respects a better rule, we think, if the creditors of the partnership were in no case — fraud, of course, excepted — permitted to proceed against the private effects of a partner severally, until they had exhausted all those means of the partnership which were accessible to them, and available without too much cost or difficulty. (*m*)

§ 254. **Rights of Private Creditors against a Partner's Interest.** — When we come to the question of the rights and remedies of a private creditor of one partner in respect to that partner's share of the partnership, we shall find much uncertainty still remaining. We apprehend, however, that a careful adherence to two principles will remove most of the difficulty. One of these is, that a creditor of any debtor can secure to himself, and for his own benefit by

(*l*) In cases at law, there never has been a doubt of the immediate liability of each partner to have the judgment against the firm fully satisfied from his assets, or of his liability *in solido*. Woolley *v.* Kelly, 1 B. & C. 68; Herries *v.* Jamieson, 5 T. R. 556; Ld. Eldon in *Ex parte* Ruffin, 6 Ves. 119; Abbot *v.* Smith, 2 W. Bl. 949, per De Grey, C. J.; Jones *v.* Clayton, 4 M. & S. 349; Villa *v.* Jonte, 17 La. Ann. 9; Nicholson *v.* Janeway, 1 Green (N. J.), 285.

(*m*) See *ante*, § 248, note (*k*).

[1] If a firm creditor attaches the separate property of a partner, levies, or gets a judgment lien, before attachment, levy, or judgment by an individual creditor, the attachment or judgment lien of the firm creditor has priority over the lien of the individual creditor, so as to hold the separate property. Louden *v.* Ball, 93 Ind. 232; Gillaspy *v.* Peck, 46 Ia. 461; Allen *v.* Wells, 22 Pick. 450; Wisham *v.* Lippincott, 1 Stock. 353; Howell *v.* Teel, 29 N. J. Eq. 490; Meech *v.* Allen, 17 N. Y. 300; Barrett *v.* Furnish, 21 Ore. 17, 26 Pac. 861; Cummings's Appeal, 25 Pa. 268; Bardwell *v.* Perry, 19 Vt. 292; Straus *v.* Kerngood, 21 Gratt. 584. But see Crockett *v.* Crain, 33 N. H. 542; Bowker *v.* Smith, 48 N. H. 111; Moody *v.* Lucier, 62 N. H. 584.

It has been intimated that if there are partnership assets from which the firm creditor may get payment, equity will interfere to protect the individual creditor. See *In re* Lewis, 8 N. B. R. 546; *In re* Sandusky, 17 N. B. R. 452; Louden *v.* Ball, 93 Ind. 232; Meech *v.* Allen, 17 N. Y. 300.

For the same reason, a debt due to an individual partner may be garnisheed by a firm creditor. Fullam *v.* Abrahams, 29 Kas. 725; Stevens *v.* Perry, 113 Mass. 380; Straus *v.* Kerngood, 21 Gratt. 584. *Contra*, Jarvis *v.* Brooks, 23 N. H. 136; Weaver *v.* Weaver, 46 N. H. 188; Myers *v.* Smith, 29 Ohio St. 120.

attachment and levy, only the property, interest, or right which his debtor has; (*n*) the other is, that this he may thus secure. The first point, therefore, is to adopt no theory and no conclusion which will offer to an attachment, or to execution, anything more or anything else than the debtor has.

§ 255. **Partner's Interest in Firm Property.** — What, then, is the right or interest or property of a partner to or in the effects of the partnership? Certainly, not a separate and exclusive right to any part or portion of it; or any right of any kind to any one part rather than to any other part; or any other right or interest than that which all the other partners have. (*o*) It follows, therefore, that he can have no right or interest which is such in kind or in degree as prevents all or any of his copartners from having precisely the same; and the right which he has is the same as theirs in reference to the whole and every part of the property. We cannot, therefore, define this right of any one partner better than we have already done, by calling it an ownership of all the property of the firm, subject to the ownership of the copartners, who hold it all subject to his ownership. This is at least the foundation of his property and interest; and from this he derives certain rights as incident to it. Thus, if no special agreement forbids, each partner may disencumber his interest from the rights of the others, by giving up his right to all the other shares or interests. That is, each one may have his own share in severalty. But, to do this, the first step is to ascertain what this share is. For it must be remembered, not only that the ownership of each partner is subject to the ownership of all the others, but that all the partners together hold the property subject to the right and obligation of the partnership as a body *per se*, to apply all its funds to the payment of all its debts. (*p*) Or, if this way of presenting this right be objected to, then we say that all the partners own all the property, subject to the right of all the creditors to have their debts paid and satisfied out of this property. (*q*)

(*n*) See *ante*, § 244, note (*c*), and cases cited. And see Smith *v.* Emerson, 43 Pa. 456.

(*o*) Lovejoy *v.* Bowers, 11 N. H. 404; Black *v.* Bush, 7 B. Mon. 210; Daniel *v.* Daniel, 9 B. Mon. 195; Church *v.* Knox, 2 Conn. 518. And see *ante*, § 244, note (*c*), the cases with admit the partner's interest alone to be taken. See Cookingham *v.* Lasher, 38 Barb. 656.

(*p*) Washburn *v.* Bank of Bellows Falls, 19 Vt. 292; Warren *v.* Willis, 38 Tex. 225.

(*q*) This ownership by partners, subject to the claims of creditors of the firm, is made by Richardson, J., the foundation of an able dissenting opinion against the right of a sheriff to take specific articles of the partnership stock for the debt of one. Wiles *v.* Maddox, 26 Mo. 77, 84. So by Parker, C. J., in Morrison *v.* Blodgett, 8 N. H. 238. In Boyce *v.* Coster, 4 Strobh. Eq. 25, it is held that the share of each partner in the joint effects is subject to his partners' liens for joint demands,

The partner who desires to separate his share of the common property, and own it free from any liability to others or any interest in others, must settle the concerns of the partnership, in the first place, so as to be sure that the debts are paid or provided for; and then he may call for a division of the joint property, and take his share to himself. He may do many other things by the consent of others; he may in that way sell out his interests to a stranger, or to a third person, who is to come into the partnership; or he may sell to his copartners. But no such arrangement liberates his share from the debts of the firm; and nothing will but their payment, or the agreement of the creditors, for consideration, to discharge him. What the law permits him to do, or cause to be done, without the consent of others, is to settle the concern, pay the debts, and then divide the surplus. This is, practically speaking, the whole of his right. And this, and only this, is therefore the right which his private creditor can acquire by attachment or execution. That is, his creditor may put himself exactly in the place of his debtor, both as to the power of the latter and as to its limitations. (*r*)

§ 256. **Right of Private Creditor to attach such Interest.** — The creditor may, therefore, attach the interest of the debtor partner in the partnership property. This is universally admitted. (*s*)

and, though aliened, was subject to their equities for a settlement. The right or lien of the partners on the joint property for their own shares, and for the payment of the partnership debts, is, however, an equity of theirs, and not primarily, if at all, of the partnership creditors, Hunt *v.* Waterman, 2 R. I. 298; Miller *v.* Estill, 5 Ohio St. 508; and may be barred, or the property removed from its operation, by any *bona fide* assignment. *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3; Miller *v.* Estill, 5 Ohio St. 508; Smith *v.* Edwards, 7 Humph. 106; Holderness *v.* Shackels, 8 B. & C. 612; Lingen *v.* Simpson, 1 Sim. & S. 600; Campbell *v.* Mullett, 2 Swanst. 575; *Ex parte* Fell, 10 Ves. 347; Griffith *v.* Buck, 13 Md. 102; Rogers *v.* Nichols, 20 Tex. 719; Stout *v.* Fortune, 7 Iowa, 183; Jones *v.* Lusk, 2 Met. (Ky.) 356; Holmes *v.* Hawes, 8 Ired. Eq. 21; Wilson *v.* Soper, 13 B. Mon. 414; Reese *v.* Bradford, 13 Ala. 846; *Ex parte* Peake, 1 Madd. 358. See *ante*, § 248, note.

(*r*) Tappan *v.* Blaisdell, 5 N. H. 193. See Inbusch *v.* Farwell, 1 Black, 566.

(*s*) Chapman *v.* Koops, 3 B. & P. 289; Moody *v.* Payne, 2 Johns. Ch. 548; per Parker, C. J., in Morrison *v.* Blodgett, 8 N. H. 252, 253; Jarvis *v.* Hyer, 4 Dev. 367; Johnson *v.* Evans, 7 M. & G. 240; Mayhew *v.* Herrick, 7 C. B. 229; Holmes *v.* Mentze, 4 A. & E. 127. So the share may be taken on *mesne* process in those States which confer this right. Pierce *v.* Jackson, 6 Mass. 242; Burgess *v.* Atkins, 5 Blackf. 337; Douglas *v* Winslow, 20 Me. 89, 92, 93. Thus, in Pierce *v.* Jackson, Parsons, C. J., says: "A creditor of one of the firm has a right to attach the partnership effects against all creditors whose demand is not upon the company." See also Allen *v.* Wells, 22 Pick. 450; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Bardwell *v.* Perry, 19 Vt. 292; Dow *v.* Sayward, 12 N. H. 276, 277; Page *v.* Carpenter, 10 N. H. 77; Hill *v.* Wiggin, 31 N. H. 292; Newman *v.* Bean, 21 N. H. 93; James *v.* Stratton, 32 Ill. 202.

But can he attach the very goods of the partnership? or, to state the question more accurately, Can the officer having the writ attach any definite portion of the goods of the partnership, and take them into his possession; or can he, holding an execution, take a portion of the goods, and sell them to satisfy it? There is much diversity of opinion on this subject; but we are unable to regard it as at all doubtful on principle; that is, the conclusion to which the principles applicable to the case lead seems to us inevitable. If there be any doubt, it must arise from the inability of the law of partnership to clear itself of the last remaining influence of the old notion, that partnership was but one form of tenancy in common. (*t*) The partner himself is wholly without the right (unless by agreement) of appropriating to himself in severalty anything whatever which belongs to the common stock. All the partners together cannot do it, if it be needed for the payment of the debts. (*u*) This is universally conceded. If a private creditor of a partner attaches his interest in any form, his attachment is certainly avoided by the insufficiency of the joint assets to pay the joint debts. (*v*) How, then, can it be held, either that the partner, before settlement of the debts and a division of the property, may, by his own act, make some portion of it his own; or that the partner

(*t*) And that this is so, see the later cases of Johnson *v.* Evans, 7 M. & G. 240; Mayhew *v.* Herrick, 7 C. B. 229, in which the court found the right of the sheriff to take possession of specific articles, on the old law as it stood in Heydon *v.* Heydon, 1 Salk. 392; Jackey *v.* Butler, 2 Ld. Raym. 871; Bachurst *v.* Clinkard, 1 Shower, 169; namely, permitting the interest of one partner to be taken as an undivided moiety. See Garvin *v.* Paul, 47 N. H. 158.

(*u*) As to the restriction upon the partners to assign in case of insolvency, actual but not avowed or acted upon by process of court, see Allen *v.* Centre Vale Co., 21 Conn. 130. And see Jones *v.* Lusk, 2 Met. (Ky.) 356; Dennis *v.* Green, 20 Ga. 386; Burtus *v.* Tisdall, 4 Barb. 571; Lucas *v.* Laws, 27 Pa. 211. [*Ante*, § 248, note.]

(*v*) And this is true even though the partnership creditors have commenced no action for the recovery of their debts. Pierce *v.* Jackson, 6 Mass. 242; Fisk *v.* Herrick, 6 Mass. 271; Rice *v.* Austin, 17 Mass. 206; Commercial Bank *v.* Wilkins, 9 Me. 28; Lyndon *v.* Gorham, 1 Gall. 368. The true reason why the resulting interest of a partner in the partnership effects cannot be attached or taken on execution lies in the nature of the interest, which is not a specific thing, having a distinct and independent existence; but is a mere result flowing from a comparison of accounts, and may fall on either side as the balance happens to be. A specific debt or demand may be unliquidated, but nevertheless has its own independent existence, and may be ascertained by computation or valuation. Not so with the interest of a partner in an unsettled partnership account. It results wholly from a comparison of the debts and credits of the partnership in the first instance, and then a comparison of the accounts between the partners themselves. If the partnership is insolvent, there is no balance for division; if solvent, then the account between the partners may show that the partner whose interest it is attempted to attach has no claim to any part of the balance. Agnew, J., Alter *v.* Brooke, 9 Phila. 258; Knerr *v.* Hoffman, 65 Pa. 126.

himself has no such right, but that his private creditor may say the partner has such right, and possess himself of it by attachment or levy or execution? The courts which have, in recent times, permitted a sheriff to attach the property of a firm in a suit against a partner, and sell the same on execution, hold also that he must not pay this over to the plaintiff, but must hold the proceeds subject to an account with the firm, to be paid to them for their creditors if needed for debts or for the other partners if it belongs to them on the settlement.[1] Or else that the purchaser takes the property as tenant in common with the other partners, and subject to an account between the partners, which, if it eventuate against him, will make his purchase give him nothing. (*w*) This is an acknowledgment that the partner holds his interest in the joint property on terms and conditions which make it unreasonable to subject that property itself to attachment as his property.

§ 257. **Right to Advantage of Private Agreements between Partners.** — We should say, therefore, that there is no general rule of the law of partnership which rests on stronger reason than that a private creditor cannot do this. But this rule is perhaps subject to some qualification. How, for example, is the creditor affected by private agreements or arrangements between the partners? (*x*) These may be of two kinds: they may be favorable to the creditor, or unfavorable. Thus, if the articles of copartnership permitted any one partner to withdraw one-third of the stock at his pleasure, or some specific articles of the joint property, it would be for the advantage of the creditor to acquire this right. If by the articles no partner could ask for a settlement, or withdraw any stock, for five years, it would be a hindrance to the creditor to be delayed so long.

In considering the question how a private creditor of the partner would be affected by such a bargain, if it were unfavorable, if, — for example, the articles of partnership provided that an account should be taken annually, and all the profits added to the stock

(*w*) Phillips *v.* Cook, 24 Wend. 398, 404; Johnson *v.* Evans, 7 M. & G. 240; Mayhew *v.* Herrick, 7 C. B. 222; Lucas *v.* Laws, 27 Pa. 211; White *v.* Jones, 38 Ill. 159. If the interest of both members of a partnership consisting of two be sold on separate executions against each to the same purchaser, he gets nothing till the partnership debts are paid. Osborn *v.* McBride, 16 N. B. R. 22. See also Menagh *v.* Whitwell, 52 N. Y. 146; Bank *v.* Carrolton R. R., 11 Wall. 624; Garvin *v.* Paul, 47 N. H. 158; Barrett *v.* McKenzie, 24 Minn. 20, 1 N. W. 123.

(*x*) Elliot *v.* Stevens, 38 N. H. 311, 313.

[1] Powers *v.* Large, 69 Wis. 621, 35 N.W. 53.

for five years, and that the partnership should not be dissolved, or any of its stock withdrawn, for five years more, and eight of these ten years remained, — it might be supposed that the well-known principle, in constant application, that no bargains between the partners affect injuriously any third person dealing with the partnership in ignorance of these bargains, would apply to this case. The reason of this principle is, that all persons have a right to believe that all partnerships stand on the common ground of the law, unless they are informed that it is otherwise. If this rule were held to apply to an attaching creditor, we should say that a private creditor of a partner, who knew of such an agreement when he gave him credit, should be bound by it as much as he would be by any other lien or encumbrance on the partner's property. But that, if he had no such knowledge or means of knowledge, he would be unaffected by the agreement. There are cases which would, indirectly at least, favor this conclusion. (*y*) But as all partners have a right to make any honest disposition of their affairs, or any arrangements between themselves, which do not injuriously affect those who deal with the firm, we should prefer to say that an attaching creditor of one of the partners would be bound by such a bargain, if made in entire good faith, and with no reference to any insolvency either of the partner or of the firm. Practically, however, it would make little or no difference. Where the interest of the debtor was sold on execution, we apprehend that this would work a dissolution of the partnership. The remaining partners would not be bound to admit the purchaser as their partner during these years; and, on the other hand (the *delectus personarum* being mutual and equal), the purchaser would not be bound to become and remain a partner with the others, against his wishes. The parties could, of course, make what arrangement they chose. But, if they could not agree, the legal effect of the sale and purchase would be a dissolution; and the legal effect of this would be an annulling of those agreements, and a right on the part of the purchaser to call at once for an account and settlement, and to take his share in severalty.

On the other supposition, that, if the partner had made an agreement adding to or enlarging his rights, the principle that the creditor takes just what the debtor has, and is put precisely in his place, would give to him all the benefit of this agreement. And the fact that he did not know it, would not prevent his profiting by it, any more than it would prevent him from profiting by

(*y*) See Penn *v.* Stone, 10 Ala. 209.

property, theretofore unknown to him, of the partnership or of the partner.

§ 258. **Method of Attaching Partner's Interest.** — The general conclusion to which we come, — and on this we rely very confidently, — is, that a separate creditor of a partner, in pursuing his remedy upon property of the firm, can attach or levy upon the partner's interest in the copartnership property, and upon nothing else. (*a*) But even where this is held, there is much diversity and uncertainty as to the proper manner of doing it. We think, however, that a clear apprehension of the principle itself would lead to a sufficient and unobjectionable method of carrying that principle into effect.

We have no doubt that this interest of the partner may be attached as well as any other interest or property, and levied upon, and sold, to satisfy a judgment. The manner in which this is done must depend somewhat upon the local statutory provisions. In general, an officer ordered to attach this interest would do so by indorsing such attachment on his writ; he should then certainly give immediate notice to the debtor, and it would be expedient and proper to give such notice to the other partners. This interest would remain under attachment. The firm could go on, dealing as before, buying and selling, and delivering goods; (*b*) because this attachment did not take effect upon any specific interest in any specific goods, but on the interest of the partner in the partnership concern.

We suppose that the transactions of the firm, after being notified of the attachment, are in good faith; and, if so, it is no objection to them that the debtor himself is active in these transactions, or in part of them. But, whether he be active or not, if the transactions are fraudulent as against the creditor, — that is, intended to delay or defeat the recovery of his debt, — they might still be valid as against him, and in favor of a stranger dealing honestly with the firm in their way of business: but would be void in favor of the creditor, as against the fraudulent partners, and as against any third party co-operating in the fraud, or dealing with the partners knowing the intention of fraud, and by thus dealing giving

(*a*) See *ante*, § 256, note (*s*); § 244, note (*c*).

(*b*) The property of the partner in his share is not entirely divested, and the firm consequently dissolved, till sale under the levy. Morrison *v.* Blodgett, 8 N. H. 238; Aspinall *v.* London & N. W. R. Co., 11, Hare, 325; but a sale of any part, however small, of the specific goods under execution, is a dissolution. Id.; Habershon *v.* Blurton, 1 De G. & S. 121; Waters *v.* Taylor, per Lord Eldon, 2 Ves. & B. 301. The same mode of attachment without seizure was held to be the only proper form in Pennsylvania. Deal *v.* Bogue, 20 Pa. 229.

it efficacy; for this would be co-operation, although the third party had no other object in view but his own interest.

So affairs might go on until judgment was obtained, and an execution issued. For, if not, it would be in the power of any person, by mere suit and allegation of a demand against a partner, to arrest the whole business of a partnership more effectually than he could do it by the allegation of a debt against the partnership itself.[1]

§ 259. **Sale of Partner's Interest on Execution.** — When execution issued, the sheriff would sell the interest of the partner in the partnership in the same manner in which he would sell any other interest or right which he levied upon, — as a right to redeem, or the like; and the proceeds would be applied to satisfy the execution. (*c*)[2]

(*c*) This is admitted as the consequence of such levy and sale in the case of Wiles *v.* Maddox, 26 Mo. 77, 84. The doctrine of the majority of the court in that case is sustained by the decisions of every law court except those of New Hampshire, Morrison *v.* Blodgett, 8 N. H. 238; Gibson *v.* Steven, 7 N. H. 357; Page *v.* Carpenter, 10 N. H. 77; Hill *v.* Wiggin, 31 N. H. 292; and of Pennsylvania, Deal *v.* Bogue, 20 Pa. 229; and of some earlier cases in New York, Crane *v.* French, 1 Wend. 313; *Ex parte* Smith, 16 Johns. 102; which were all conclusively overruled in Phillips *v.* Cook, 24 Wend. 397; Waddell *v.* Cook, 2 Hill, 47, and note; Walsh *v.* Adams, 3 Denio, 125, &c. Even in New Hampshire, the unfortunate effects of the ordinary method of attachment without the power to make it operative except in equity, because a mere contingent right is sold that no one cares to buy, have been so severely felt, that, in Hill *v.* Wiggin, the result is described by the judge as affording a secure means for fraudulent debtors to get their money securely out of the reach of the law. Hill *v.* Wiggin, 31 N. H. 292, 296.

[1] The method of procedure in levying upon partnership property for the debt of one partner presents much difficulty. The legal title to the partnership property is necessarily in the partners, since the partnership is not recognized at law as capable of holding property. The partners are legally joint tenants, holding, however, in trust for the partners. The purchaser on execution steps into the shoes of the debtor partner, and becomes technically a tenant in common with the other partners. Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98; Marx *v.* Goodnough, 16 Ore. 26, 16 Pac. 918; Randall *v.* Johnson, 13 R. I. 338.

It would seem that since the interest actually sold is a right to an account, and a partner has no beneficial interest in a specific chattel, the sheriff ought not to levy upon any specific chattel, but upon the partner's interest in all the assets, and that to levy upon a specific chattel would be an act of trespass. But though some authorities hold that the only proper course is to levy upon all the assets (Gerard *v.* Bates, 124 Ill. 150, 16 N. E. 258; Stumph *v.* Bauer, 76 Ind. 157), and that the actual removal of a specific chattel is trespass (Sanborn *v.* Roycè, 132 Mass. 594), the mere fact of levying upon and selling a specific chattel seems not to be so regarded. On the other hand, some authorities hold it proper to levy upon and sell a partner's interest in a specific chattel. Hershfield *v.* Claflin, 25 Kas. 166 (*semble*); Fogg *v.* Lawry, 68 Me. 78; Randall *v.* Johnson, 13 R. I. 338.

[2] Upon execution against one partner the sheriff may sell the partner's interest in the firm assets; but the purchaser gets only a right to ask for an account, and to have

The purchaser would not become a partner; but he would stand in the place of the partner whose interest he bought, and

paid to him the distributive share of the debtor partner. He gets no title to any specific property. Farley *v.* Moog, 79 Ala. 148; Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; Clark *v.* Cushing, 52 Cal. 617; Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98; State *v.* Emmons, 99 Ind. 452; Aultman *v.* Fuller, 53 Ia. 60; People's Bank *v.* Shryock, 48 Md. 427; Barrett *v.* McKenzie, 24 Minn. 20; Lane *v.* Lenfest, 40 Minn. 375, 42 N. W. 84; Clements *v.* Jessup, 36 N. J. Eq. 569; Deane *v.* Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292; Staats *v.* Bristow, 73 N. Y. 264; Marx *v.* Goodnough, 16 Ore. 26, 16 Pac. 918; Cogswell *v.* Wilson, 17 Ore. 31, 21 Pac. 388; Wallace's Appeal, 104 Pa. 559; Boro *v.* Harris, 13 Lea, 36; Meyberg *v.* Steagall, 51 Tex. 351; Lee *v.* Wilkins, 65 Tex. 295; McCutchon *v.* Davis (Tex.), 8 S. W. 123. Consequently if the firm is insolvent the purchaser gets nothing. Staats *v.* Bristow, 73 N. Y. 264. And if in such a case a sheriff wrongfully fails to levy, damages recoverable against him are nominal only. State *v.* Emmons, 99 Ind. 452.

It would seem clear on principle that the sheriff should not deliver actual possession of the property to the purchaser on execution, since the latter gets no interest in it; for as no interest passes in a specific chattel, clearly no interest passes in all the chattels. And there is authority to this effect. Lane *v.* Lenfest, 40 Minn. 375, 42 N. W. 84. Other authorities hold that since the purchaser becomes a technical tenant in common he may take and hold the property, subject to the right of the other partners to have it applied in payment of the firm debts. Wright *v.* Ward, 65 Cal. 525, 4 Pac. 534; Randall *v.* Johnson, 13 R. I. 338; Trafford *v.* Hubbard, 15 R. I. 326, 4 Atl. 762; Lee *v.* Wilkins, 65 Tex. 295 (*semble;* otherwise by statute). This is held, although the debtor has overdrawn his accounts so that nothing is due him on an accounting, and the seizure of the assets will break up the business. Wright *v.* Ward, 65 Cal. 525, 4 Pac. 534; Trafford *v.* Hubbard, 15 R. I. 326, 4 Atl. 762. But if the sheriff sells the chattels themselves, rather than the debtor's interest in them, it is a wrong to the firm, and he becomes a trespasser *ab initio.* Daniel *v.* Owens, 70 Ala. 297 (*semble*); Snell *v.* Crowe, 3 Utah, 26, 5 Pac. 522.

It has been held that on execution upon a joint debt (not a firm debt) of the partners, the sheriff may sell a chattel of the partnership. See *ante,* § 248, note. This case is hardly consistent with the principle that the property belongs to the partnership and not to the partners.

It has sometimes been held that no harm is done to the firm by the sale, and that equity will therefore not enjoin it. Peck *v.* Schultze, 1 Holmes, 28; Jones *v.* Thompson, 12 Cal. 191; Brewster *v.* Hammet, 4 Conn. 540 (but see Witter *v.* Richards, 10 Conn. 37); Sitler *v.* Walker, Freem. Ch. 77; Wickham *v.* Davis, 24 Minn. 167 (where the reason given was, that the partnership was insolvent); Moody *v.* Payne, 2 Johns. Ch. 548. But by the weight of authority the sale may be enjoined till an account is taken. Bevan *v.* Lewis, 1 Sim. 376; Osborn *v.* McBride, 3 Sawy. 590; Crane *v.* Morrison, 4 Sawy. 138; Cropper *v.* Coburn, 2 Curtis, 465; Moore *v.* Sample, 3 Ala. 319 (*semble*); Newhall *v.* Buckingham, 14 Ill. 405 (*semble*); Hubbard *v.* Curtis, 8 Ia. 1; White *v.* Woodward, 8 B. Mon. 484 (*semble*); Thompson *v.* Lewis, 34 Me. 167; Crooker *v.* Crooker, 46 Me. 250; Thompson *v.* Frist, 15 Md. 24 (*semble*); Sanders *v.* Young, 31 Miss. 111 (*semble*); Cammack *v.* Johnson, 1 Green Ch. 163 (*semble*); Place *v.* Sweetzer, 16 Ohio, 142; Nixon *v.* Nash, 12 Ohio St. 647 (*semble*); Meyberg *v.* Steagall, 51 Tex. 351.

Where both the firm creditors and the separate creditors attach the firm property, or the separate creditors attach and the firm then goes into bankruptcy, the firm creditors are preferred though their attachment is subsequent in time. Taylor *v.* Fields, 4 Ves. 396; Garbett *v.* Veale, 5 Q. B. 408; King *v.* Sanderson, Wightw. 50; Clark *v.* Allee, 3 Harr. 80; O'Bannon *v.* Miller, 4 Bush, 25; Howell *v.* Com. Bank, 5 Bush, 93; Commercial Bank *v.* Wilkins, 9 Me. 28; Douglas *v.* Winslow, 20 Me.

acquire all of his rights which were necessary to make this interest valuable and available. That is, he would have the right to call for an account, and a settlement of the partnership concern, and to take his share of any surplus in severalty. And a court of equity would probably render him the same assistance in obtaining or enforcing these rights that they would to the partner whose interest he has bought. This, however, like almost every thing else in equity, would be addressed to the discretion of the court, and could not be claimed as a matter of strict and technical right. For if the case were one which admitted of easy and accurate estimate, and certainly sufficient tender, and this were made, the court would not require a settlement which would be injurious to the partnership, and was asked for by this purchaser only for oppressive or dishonest purposes.[1]

§ 260. **Garnishment of other Partners.** — An additional step to that of attaching the separate partner's interest has been suggested on high authority. (*d*) It is to sue the indebted partner by

(*d*) In Morrison *v.* Blodgett, 8 N. H. 238, Parker, C. J., suggested, as a means of rendering available an attachment of the partnership effects for the private debt of a partner, the expediency and necessity of summoning the other partners as trustees. See also Treadwell *v.* Brown, 43 N. H. 290. A similar suggestion had previously been made by Parsons, C. J., in Fisk *v.* Herrick, 6 Mass. 271, where a debtor of the partnership had been ineffectually summoned as trustee in a suit against one partner of the creditor firm; and in Lyndon *v.* Gorham, 1 Gallison, 261, Mr. Justice Story recognized that course as likely to obviate some of the difficulties in the case then before the court. But we know of no case in which a portion of the members or the whole partnership have been held as trustees in a suit of foreign attachment, upon the private debt of one partner. The course thus suggested and approved is entitled to the highest consideration, and

89 (*semble*); Thompson *v.* Lewis, 34 Me. 167 (*semble*); Pierce *v.* Jackson, 6 Mass. 242; Trowbridge *v.* Cushman, 24 Pick. 310; Tappan *v.* Blaisdell, 5 N. H. 190; Linford *v.* Linford, 4 Dutch. 113 (*semble*); Eighth Nat. Bank *v.* Fitch, 49 N. Y. 539; Roberts *v.* Oldham, 63 N. C. 297; Overholt's Appeal, 12 Pa. 222; Coover's Appeal, 29 Pa. 9; Crawford *v.* Baum, 12 Rich. 75. But *contra*, if at the time of the attachment the firm was solvent, Willis *v.* Freeman, 35 Vt. 44; Lamoille V. R. R. *v.* Bixby, 55 Vt. 235. See Cunningham *v.* Gushee, 73 Me. 417; De Caussey *v.* Baily, 57 Tex. 665.

1 *Garnishment.* — As with attachment, so it is with garnishment. A creditor of an individual partner cannot reach a firm debtor, since no part of the debt is due to the partner; it is all owed to the firm. Church *v.* Knox, 2 Conn. 514; Crescent Insurance Co. *v.* Bear, 23 Fla. 50, 1 So. 318; Trickett *v.* Moore, 34 Kas. 755, 10 Pac. 147; Peoples' Bank *v.* Shryock, 48 Md. 427; Hawes *v.* Waltham, 18 Pick. 451; Tobey *v.* McFarlin, 115 Mass. 98; Markham *v.* Gehan, 42 Mich. 74; Barrett *v.* McKenzie, 24 Minn. 20; Williams *v.* Gage, 49 Miss. 777; Sheedy *v.* Bank, 62 Mo. 17; Atkins *v.* Prescott, 10 N. H. 120 (*semble*); Myers *v.* Smith, 29 Oh. St. 120; Sweet *v.* Read, 12 R. I. 121; Johnson *v.* King, 6 Humph. 233; Towne *v.* Leach, 32 Vt. 747; Singer *v.* Townsend, 53 Wis. 126. But see Parker *v.* Wright, 66 Me. 392 (*semble*); McCarty *v.* Emlen, 2 Yeates, 190, 2 Dall. 277; Schatzill *v.* Bolton, 2 McC. 478, 3 McC. 33.

process of foreign attachment or garnishee process or trustee process, as it is variously called, and make the other partners trustees. They would then be required to answer under oath; and the interests, rights, and property of the principal defendant in their hands might thus be more effectually held. It might be that our courts would find some difficulty in the complete application of such a system to practise, unless they were aided by legislative provisions; (*e*) and perhaps no other questions of commercial law call so loudly, at this time, for such provisions.[1]

§ 261. **Effect of Insolvency.** — We have already remarked, that the attachment by a separate creditor of a partner, of his debtor's interest in the partnership, or of the goods themselves, is vacated by the insolvency of the partnership, which leaves in the partner no interest, and requires all the property to pay the debts. (*f*) But it is also vacated by the fact of insolvency, prior to any proceedings founded thereon, whether there be a general process of insolvency or suits by individual creditors. But a distinction seems to be taken in this respect between the case of a dormant (that is, secret) partner and a known partner. Thus, if a man in business have a dormant partner, and a creditor of the first sue him and attach his goods, this attachment shall not be postponed to a later attachment by another creditor, who discovers this unknown partner, and makes him defendant. (*g*) For, if both creditors stand on equal ground as to their claims, the fact that one happens to discover, and sues, a partner not publicly known, should give him no advantage over one who sues in fact the partnership, and uses all the names that the firm enables him to know. It is not so, however, in its reason, and, we think, not on authority, where the creditors stand on different grounds. Thus, if the first creditor dealt with the known partner only, and did not deal with him in fact on partnership account, but did

may prove to be practically the best that can be pursued in the present condition of the law. But it is obvious that the law of partnership, taken in connection with the law of trustee process or foreign attachment, offers some difficulties; and we do not know that this course has been generally adopted.

(*e*) See Field *v.* Crawford and Trs., 6 Gray, 116; Lane *v.* Felt, 7 Gray, 491; Treadwell *v.* Brown, 41 N. H. 12; Bulfinch *v.* Winchenbach, 3 Allen, 161.

(*f*) Lyndon *v.* Gorham, 1 Gall. 367; Commercial Bank *v.* Wilkins, 9 Me. 28. And see Fisk *v.* Herrick, 6 Mass. 271; Upham *v.* Naylor, 9 Mass. 490; Church *v.* Knox, 2 Conn. 514.

(*g*) French *v.* Chase, 6 Me. 166; Lord *v.* Baldwin, 6 Pick. 348. See also Cammack *v.* Johnson, 1 Green, Ch. 164; Allen *v.* Dunn, 15 Me. 292.

[1] One partner cannot be garnisheed as debtor of his copartner on account of an unascertained balance. Birtwhistle *v.* Woodward, 95 Mo. 113, 7 S. W. 465; Elmer *v.* Hall (Pa.), 23 Atl. 971.

attach partnership property, then this attachment must yield to one on which partnership property is taken in a suit properly brought against all the partners. And we apprehend the result should be the same although the known partner was the only defendant in both writs. That is, if a man transacted business on his sole account, and also had a secret and silent partner, and with him transacted another business, which was distinctly a partnership business, and became insolvent, and creditors in his own business attached his property, and creditors in the partnership business also attached the property, either before or after the others, we suppose that a court of equity, if it could discriminate the debts and discriminate the property, would give relief, and appropriate the partnership property to the partnership debts, and the private property to the private debts. And we should suppose that courts of law would now, generally at least, follow the same rule to the same result.

§ 262. **Set-off.** — [A partnership debtor cannot set off against the firm claim a debt due him from a partner individually;[1] though it may be done if all the partners assent.[2] So a partnership debt cannot be used as a set-off against the claim of a partner individually, as by a bank against the deposit of a partner.[3] But where a partnership debt is reduced to a judgment, since the judgment runs against the partners individually, it may be used as a set-off against the claim of an individual partner.[4]]

[1] Clark *v.* Taylor, 68 Ala. 453; Watts *v.* Sayre, 76 Ala. 397 (judgment debts); Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676; Edwards *v.* Parker, 88 Ala. 356, 6 So. 684; Morganthau *v.* King, 15 Col. 413, 24 Pac 1048; Weil *v.* Jones, 70 Mo 560; Payne *v.* O'Shea, 84 Mo. 129; Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl 80.

[2] Montz *v.* Morris, 89 Pa. 392.

[3] International Bank *v.* Jones, 119 Ill. 407, 9 N. E. 885; Raymond *v.* Palmer, 41 La Ann. 425, 6 So. 692. *Contra*, Eyrich *v.* Capital State Bank, 67 Miss. 60, 6 So. 615 (because by statute an individual partner may be sued alone for a firm debt).

[4] Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

CHAPTER XI.

ON THE REAL ESTATE OF A PARTNERSHIP.

§ 263. **Partnership Land.** — Formerly, the title of this chapter could have found no place in a treatise on the law of partnership. The distinction which existed at common law between real estate and personal estate has been bridged over only of late. It used to be deemed that the purposes of partnership, and the means which it used, excluded all reference to land, and that the law of partnership could not with propriety speak of land. (*a*) But in England this doctrine has long been greatly modified; and now, by the assistance of equity, a tolerably convenient and consistent system is in force there. Mr. Justice Story, in his treatise on Partnership, (*aa*) remarks: "The doctrine (as to real estate), under these circumstances, must be considered as open to many distressing doubts." We apprehend, however, that a careful consideration of American cases will show that, in this country, most of these doubts have been dispelled. Indeed, few questions remain, in relation to this subject, as to which authority, illustrated by the reasons and principles which are unquestionably applicable, do not give us a sufficiently distinct and definite answer.

§ 264. **Difference between English and American Law.** — There are two reasons why we might have expected an improvement in the American law on this subject over that of England. One is, our less rigid conservatism; or, in other words, the weaker influence of precedent and prescription, and the greater facility of change. This reason, however, applies to the whole body of our law. The other applies peculiarly to this topic. It is, that land is, with us, vastly more a matter of merchandise than in England. It is every day's practice for individuals and partner-

(*a*) In Pitts *v.* Waugh, 4 Mass. 424, where it was sought to charge a person as partner in an action for the price of land sold to the ostensible partner alone, the court said, "The law-merchant does not extend to speculations in land;" and it was formerly considered in England that the rule, *jus accrescendi inter mercatores locum non habet,* applied only to personal property; and it was also thought necessary to provide against survivorship in the partnership articles Jeffreys *v.* Snell, 1 Vern. 217.

(*aa*) Section 93.

ships to engage in business, of which the principal, and sometimes the only element is trade or speculation in land. (*b*) There is nothing to make this illegal, or, within proper bounds, impolitic or undesirable. At all events, the law recognizes it, and must take charge of it, as of all other social or business movements. Questions to which such business as this gives rise not only come before our courts with great frequency, and demand for their settlement well-considered and well-established principles, but they come in such a form as to compel important modifications of the technical law of real estate. (*c*)

It must be obvious that these questions connect themselves with many others. But the remaining influence of the peculiar law of real estate — an influence which must remain until our whole system of law is changed by legislative authority — imparts to all the details of this subject a character peculiar to them and common to them all; and it is thought best to gather under one head all that the law and practice of our American courts have to say about the real estate of a partnership.

§ 265. **When and how Real Estate becomes Partnership Property.** — The general rule is undoubtedly this: Real estate purchased for partnership purposes, and appropriated to those purposes, paid for by partnership funds, and necessary for partnership purposes, always becomes partnership property. (*e*) [1]

(*b*) This, after some doubts, see Pitts *v.* Waugh, 4 Mass. 424; Blake *v.* Nutter, 19 Me. 16; Coles *v.* Coles, 15 Johns. 169, in cases occurring before courts of law, was early recognized in this country. See Dudley *v.* Littlefield, 21 Me. 418; Fall River Whaling Co. *v.* Borden, 10 Cush. 469; Black *v.* Black, 15 Ga. 445; Gray *v.* Palmer, 9 Cal. 616; Smith *v.* Jones, 12 Me. 337; Ludlow *v.* Cooper, 4 Ohio St. 1; Coster *v.* Clarke, 3 Edw. Ch. 238; Patterson *v.* Grace, 10 Ala. 444; Rowland *v.* Boozer, 10 Ala. 690; *In re* Warren, 2 Ware (Davies), 320. And in England, Dale *v.* Hamilton, 5 Hare, 369; Darby *v.* Darby, 3 Drewry, 495.

(*c*) Dudley *v.* Littlefield, 21 Me. 418; Coster *v.* Clarke, 3 Edw. Ch. 238; Darby *v* Darby, 3 Drewry, 495; Dilworth *v.* Mayfield, 36 Miss. 40; Brady *v.* Calhoun, 1 Pen. & W. 140; Woodbridge *v.* Wilkins, 3 How. (Miss.) 360; Markham *v.* Merrett, 7 How. (Miss.) 437.

(*e*) Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, 5 Met. 582; Burnside *v.* Merrick, 4 Met. 587; Delmonico *v.* Guillaume, 2 Sandf. Ch. 336; Buchan *v.* Sumner, 2 Barb. Ch. 165, 197; Duhring *v.* Duhring, 20 Mo. 174; Matlock *v.* Matlock, 5 Ind. 403; Patterson *v.* Blake, 12 Ind. 436; Davis *v.* Christian, 15 Gratt. 11; Pierce *v.* Trigg, 10 Leigh, 246; Jones *v.* Neale, 2 Pat. & H. 339; Lacy *v.* Waring, 25 Ala. 625; Andrews *v.* Brown, 21 Ala. 437; Owens *v.* Collins, 23 Ala. 837; Pugh *v.* Currie, 5 Ala. 446; Tillinghast *v.* Champlin, 4 R. I. 173; Buckley *v.* Buckley, 11 Barb. 43, Blake *v.* Nutew, 19 Me. 16; Holland *v.* Fuller, 13 Ind. 195, 199; Overholt's Appeal, 12 Pa. 222; Deloney *v.* Hutcheson, 2 Rand. 183; Hunt *v.* Benson, 2 Humph. 459;

[1] That a firm may purchase and deal in lands is now perfectly well settled. This is true although there are no written articles. Allison *v.* Perry, 130 Ill. 9, 22 N. E.

Nor does it seem to be material in what manner, or by what agency, the land is bought, or in what name it stands. (*f*) It

Forde *v.* Herron, 4 Munf. 316; Goodburn *v.* Stevens, 5 Gill, 1; Sigourney *v.* Munn, 7 Conn. 11; Jarvis *v.* Brooks, 27 N. H. 37; Cox *v.* McBurney, 2 Sandf. 561; Brooke *v.* Washington, 8 Gratt. 248; Peck *v.* Fisher, 7 Cush. 386; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Savage *v.* Carter, 9 Dana, 408, 410, 411; Fairchild *v.* Fairchild, 64 N. Y. 471. These cases maintain the general proposition in America. And this partnership title may be proved by parol, notwithstanding the paper title. Sherwood *v.* St. Paul, &c. 21 Minn. 127; York *v.* Clemens, 41 Iowa, 93; *ante*, § 6. So in England, Phillips *v.* Phillips, 1 Mylne & K. 649; Houghton *v.* Houghton, 11 Sim. 491; Townshend *v.* Devaynes, Montagu on Part. App. 96. And see Roper on Husb. & W. (Jac. ed.) 346, n.; Broom *v.* Broom, 3 Mylne & K. 443; Morris *v.* Barrett, 3 Younge & J. 384. See also Kendall *v.* Rider, 35 Barb. 100; Dupuy *v.* Leavenworth, 17 Cal. 262; Buffum *v.* Buffum, 49 Me. 108; Moran *v.* Palmer, 13 Mich. 367; North Penn. Coal Co.'s Appeal, 45 Pa. 181; Willis *v.* Freeman, 35 Vt. 44; Fowler *v.* Bailey, 14 Wis. 125.

(*f*) Gilchrist, C. J., in Jarvis *v.* Brooks, 27 N. H. 37, 67; Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, 5 Met. 582; Pugh *v.* Currie, 5 Ala. 446.

492. Thus, a firm may give a lease of its land. Williams *v.* Shelden, 61 Mich. 311, 28 N. W. 115. The owner of the land is the firm; the individual partners have no beneficial interest in the land. As in the case of personal property, the interest of a partner in the partnership real estate is only to a distributive share upon a final accounting and settlement. Railsback *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504; Bowen *v.* Billings, 13 Neb. 439, 14 N. W. 152; Du Bree *v.* Albert, 100 Pa. 483. So where one partner sells his interest in the partnership to a stranger, who is admitted to the firm by parol, he has the same interest in the partnership real estate as the other partners; his assignor retains only a naked legal title. Marsh *v.* Davis, 33 Kas. 326, 6 Pac. 612; Collner *v* Greig, 137 Pa. 606, 20 Atl. 938.

The nature of the firm's interest in real estate is strikingly shown by the case of Henry *v.* Anderson, 77 Ind. 361. In that case it appeared that one partner made a deed of land owned by him to the firm, but retained the deed. It was objected that the deed was inoperative because he was both grantor and grantee; but it was held valid. His entire title was divested, and vested in the firm; and the deed was sufficiently delivered.

Since a partner has no individual interest in the land he cannot ask for partition. Pennybacker *v.* Leary, 65 Ia. 220, 21 N. W. 575; Kruschke *v.* Stefan, (Wis.) 53 N. W. 679. And a partner who does not hold a share of the legal title is not a necessary party to a suit for partition, brought by one with whom the partnership is a tenant in common. Railsback *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504.

But the partners may agree to withdraw partnership land from the common stock and make it the individual property of one or both partners; and if this is done in good faith the partnership creditors cannot object. Shafer's Appeal, 106 Pa. 49; Beckwith *v.* Manton, 12 R. I. 442, Kendall *v.* Hackworth, 66 Tex. 499. It may be done by parol, since it is not technically a conveyance of the legal title, but a partition by joint tenants. Murrell *v.* Mandlebaum (Tex.) 19 S. W. 880.

As in case of personal property, so in the case of real estate, a partner cannot claim a homestead or other exemption from attachment or levy out of the partnership real estate. Short *v.* McGruder, 22 F. R. 46; Levy *v.* Williams, 79 Ala, 171; Trowbridge *v.* Cross, 117 Ill. 109, 7 N. E. 347; Van Staden *v.* Kline, 64 Ia. 180, 20 N. W. 3; Drake *v.* Moore, 66 Ia. 58, 23 N. W. 263; Hoyt *v.* Hoyt, 69 Ia. 174, 28 N. W. 500 (against partner after payment of firm creditors); Lindley *v.* Davis, 6

may be conveyed to all the partners as tenants in common, and this perhaps is the usual and the best way; (*g*) or to one or more

(*g*) Dyer *v.* Clark, 5 Met. 562: Howard *v.* Priest, 5 Met. 582. See Collumb *v.* Read, 24 N. Y. 505; and as in many States joint tenancy is abolished by statute, deeds to the partners, by their individual names, create at law, in such States, an estate in common.

Mont. 453, 13 Pac. 118; Spiro *v.* Paxton, 3 Lea, 75; Chalfant *v.* Grant, 3 Lea, 118. *Contra,* Hunnicutt *v.* Summey, 63 Ga. 586; Blanchard *v.* Paschal, 68 Ga. 32 (by interpretation of Constitution). In South Dakota the firm may claim an exemption, which thereupon enures (as individual, not as firm property) to the partners in proportion to their shares. Betts *v.* Letcher, (S. D.) 46 N. W. 193. In South Carolina it is held that individual partners may claim an exemption, but only when there is a surplus of assets over liabilities, since then the partners have an individual interest in the land. *Ex parte* Karish, 32 S. C. 437, 11 S. E. 298, explaining Moyer *v.* Drummond, 32 S. C. 165, 10 S. E. 952.

If the real estate has been so treated by the partners acting in good faith, as to have become the individual property of one partner, he may claim exemption out of it. Lindley *v.* Davis, 7 Mont. 206, 14 Pac. 717; Wiesenfeld *v.* Stevens, 15 S. C. 554; Swearingen *v.* Bassett, 65 Tex. 267. As by sale to one partner of all the interest of the other. Levy *v.* Williams, 79 Ala. 171. Of course such a withdrawal of the property from the firm assets is ineffectual as against a prior attaching creditor. Lindley *v.* Davis, 6 Mont. 453, 13 Pac. 118.

Since a partnership cannot hold the legal title to land, a deed to a firm by name does not convey the legal title to the firm. But a firm may by its name make a valid contract; and a deed to a firm by name operates as a valid contract to convey, and gives the firm an equitable title. Blanchard *v.* Floyd, 93 Ala. 53, 9 So. 418; Percifull *v.* Platt, 36 Ark. 456; Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497; New Vienna Bank *v.* Johnson, 47 Oh. St. 306, 24 N. E. 503; Kelley *v.* Bourne, 15 Ore. 476, 16 Pac. 40; Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252.

However the deed is made, it should (in the absence of agreement to take title in the name of one partner) mention the firm, in order that there may be notice of the fact that it is firm land; and either partner may insist on this being done. Davis *v.* Davis, 60 Miss. 615; Traphagen *v.* Burt, 67 N. Y. 30; Kruschke *v.* Stefan, (Wis.) 53 N. W. 679 (*semble*).

When a deed of land runs to the firm by name, it is held in some jurisdictions that all the partners, whether named or not, become at law tenants in common, in trust for the firm. Slaughter *v.* Doe, 67 Ala. 494; Brunson *v.* Morgan, 76 Ala. 593; Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760; Powers *v.* Robinson, 90 Ala. 225, 8 So. 10; Printup *v.* Turner, 65 Ga. 71; Allen *v.* Whetstone, 35 La. Ann. 846; Smith *v.* Sinnott, 44 La. Ann. 51, 10 So. 413. In such a case where one of the partners dies before the conveyance, the survivor and the grantor are tenants in common of the legal title; and the heir of the deceased partner may go into equity and get a conveyance from the grantor. Blanchard *v.* Floyd, 93 Ala. 53, 9 So. 418.

In other jurisdictions it is held that if the name of any of the partners is contained in the firm name, they take the legal title. Percifull *v.* Platt, 36 Ark. 456; Gille *v.* Hunt, 35 Minn. 357, 29 N. W. 2 (but see Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497). But if the firm name contains the name of none of the partners, the deed is inoperative at law, and the grantor named retains the legal title in trust for the firm. Percifull *v.* Platt, 36 Ark. 456; New Vienna Bank *v.* Johnson, 47 Oh. St. 306, 24 N. E. 503; Kelley *v.* Bourne, 15 Ore. 476, 16 Pac. 40 (*semble*).

Where land is conveyed to the partners individually, but is bought for the firm, it is firm land. Spalding *v.* Wilson, 80 Ky. 589; May *v.* New Orleans & C. R. R., 44 La. Ann. 444, 10 So. 769; Ross *v.* Henderson, 77 N. C. 170; Norwalk Nat. Bank

of the partners, in trust for the whole partnership, and this is not uncommon; (h) or to a stranger, under a similar trust, and this is sometimes although not often done. (i) Nor is it necessary that the trust should be expressed; for, however proper and expedient this is, yet, if the trust be wholly omitted and have no existence on record, the law will sometimes, (j) and equity always,

(h) Coster *v.* Clarke, 3 Edw. Ch. 428; McGuire *v.* Ramsey, 9 Ark. 418.

(i) Per Gilchrist, C. J., in Jarvis *v.* Brooks, 27 N. H. 37, 67; Moreau *v.* Saffarans, 3 Sneed, 600; per Story, J., in Hoxie *v.* Carr, 1 Sumner, 173, 182.

(j) The interference of a common-law court in behalf of the *cestui que trust* beneficially interested in the partnership real estate, is ordinarily only indirect and to a limited extent; as in the case of a levy on execution of a private creditor. This it does in pursuance of a rule sometimes asserted in equity, that upon such levy only the separate interest of the debtor can be sold; and it gives effect to this rule by rendering the sheriff liable in trover or trespass if he sell more than this; or by suspending judgment to await the result of a pending suit in equity, as in Peck *v.* Fisher, 7 Cush. 386; or in some such indirect mode. For a stay of sale, resort

v. Sawyer, 38 Oh. St. 339; Page *v.* Thomas, 43 Oh. St. 38, 1 N. E. 79. But see *contra*, Holt's Appeal, 98 Pa. 257.

Where the title to land is in the name of one partner, but the land really belongs to the firm, it is treated as the real estate of the firm; it is commonly said that there is a resulting trust for the firm. Riddle *v.* Whitehill, 135 U. S. 621; Rice *v.* Pennypacker, 5 Houst. 279; Paige *v.* Paige, 71 Ia. 318, 32 N. W. 360; Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297 (*semble*); Collins *v.* Decker, 70 Me. 23; Harris *v.* Harris, 153 Mass. 439, 26 N. E. 1117; Way *v.* Stebbins, 47 Mich. 296, 11 N. W. 166; Davis *v.* Davis, 60 Miss. 615; Bowen *v.* Billings, 13 Neb. 439, 14 N. W. 152; Smith *v.* Jones, 18 Neb. 481, 25 N. W. 624; Messer *v.* Messer, 59 N. H. 375; McCully *v.* McCully, 78 Va. 159; Diggs *v.* Brown, 78 Va. 292; Case *v.* Seger, 4 Wash. St. 492, 30 Pac. 646. And so where a partner contributes land to a partnership, but makes no conveyance, he holds the title in trust for the firm. Wiegand *v.* Copeland, 14 F. R. 118; Batty *v.* Adams Co., 16 Neb. 44, 20 N. W. 15. Where the legal title stands in the name of the partners, and the firm sells the land and receives the consideration, but one partner does not join in the deed, he is a trustee for the purchaser, and may be compelled to convey. Brunson *v.* Morgan, 84 Ala. 598, 4 So. 589.

The mere fact that land is bought with money of the firm does not necessarily make it firm property. It must also be bought for firm purposes. If bought with firm money, but for individual purposes, it is the property of the partners individually. Ames *v.* Ames, 37 F. R. 30 (*semble*); Rice *v.* Pennypacker, 5 Houst. 279; Alkire *v.* Kahle, 123 Ill. 496, 17 N. E. 693; Chandler *v.* Jessup, (Ind.) 31 N. E. 1109; Providence *v.* Bullock, 14 R. I. 353. On the other hand, the mere fact that land is used by the firm does not make it partnership property. It may remain the property of one partner (or conceivably of all the partners) though the use of it is allowed the firm. Hatchett *v.* Blanton, 72 Ala. 423: Goepper *v.* Kinsinger, 39 Oh. St. 429. Whether the land becomes partnership land is a question of intention, to be determined by the circumstances, and the concurrence of payment and use by the firm is usually conclusive. Ames *v.* Ames, 37 F. R. 30; Rice *v.* Pennypacker, 5 Houst. 279; Goepper *v.* Kinsinger, 39 Oh. St. 429. When two tenants in common own land, and carry on a partnership business which is ancillary to the land, — quarrying stone, for instance, or farming, — the land still remains the land of the individual partners. Steward *v.* Blakeway, L. R. 4 Ch. 603; Ratcliffe *v.* Mason, (Ky.) 17 S. W. 438; Berry *v.* Folkes, 60 Miss. 576.

supply this want, and treat the ownership as a distinct trust, if only the trust exist and is capable of proof, and the land be in fact and substance partnership property. We consider it an established rule in equity, that any party holding the legal title to land, however it may have come to him, will be held as trustee for the partnership, if it be certain that the land was in fact a part of their joint property as partners. (*k*) But although it be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint-tenants, or tenants in common; and if they are copartners in the ownership of the land, the partnership as to that will be terminated by a sale of the land, excepting so far as the proceeds are needed for the debts of the partnership. (*kk*)

§ 266. **Elements necessary to make Land Partnership Property.** — We consider that the three elements we have above stated must unite, in order to make the real estate *necessarily* partnership property. (*l*) For if it be not purchased for partnership purposes, and even if it be paid for by partnership funds, and is in fact appropriated to the purposes of the partnership, it is very possible that one partner is the owner of it, and is to be charged with its value on the books, and credited with fair compensation for its use. Such a fact may be proved; but it will not be presumed. (*m*) So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it. (*n*) And if not appropriated to the purposes of the partnership, however purchased and paid for, it

must be had to chancery to obtain an injunction. And in most other cases, protection for this trust must be sought in equity.

(*k*) Such a trust is necessarily implied in favor of the partnership where the property has been made partnership property under the limitations above; that is, bought with partnership funds for partnership purposes, and employed for such purposes. See Dyer *v.* Clark, 5 Met. 562; Pugh *v.* Currie, 5 Ala. 446; Morris *v.* Barrett, 3 Younge & J. 384; Owens *v.* Collins, 23 Ala. 837; [Hatchett *v.* Blanton, 72 Ala. 423.] The doctrine rests on the broad foundation of a resulting trust.

(*kk*) Thompson *v.* Bowman, 6 Wall. 316.

(*l*) Whether real property shall become partnership stock or not is a question of intention. Per Story, J., in Hoxie *v.* Carr, 1 Sumner, 183; also, see Fall River Whaling Co. *v.* Borden, 10 Cush. 462. But this intention may, so far as all claimants, except *bona fide* purchasers without notice, are concerned, be held sufficiently established, if the purchase is made with partnership funds, even without intended or actual use for partnership purposes, unless an express agreement appears vesting the beneficial as well as the legal interest in the grantee or grantees in the deed. Smith *v.* Smith, 5 Ves. 189; Hunt *v.* Benson, 2 Humph. 459.

(*m*) Smith *v.* Smith, 5 Ves. 189; Hunt *v.* Benson, 2 Humph. 459.

(*n*) Marvin *v.* Trumbull, Wright, 386; Owens *v.* Collins, 23 Ala. 837; Wheatley *v.* Calhoun, 12 Leigh, 264.

is possible that the firm, perhaps changing their intention, from the unfitness of the estate for their use or for any other reason, had agreed that it should be his alone who uses it, and that he should pay the firm for it in some way. (*o*) Indeed, it might be said, that even if real estate be purchased for, used for, and paid for by the firm, it may still be shown not to be partnership property. This is not impossible; but the strongest proof would be required of a thing in its nature so improbable.

§ 267. **Question one of Intention.** — This is one of those questions which must be determined altogether from the intention of the parties. It is impossible for a partnership, as such, to hold the legal title of real estate. Only a person can do this; and a corporation, only because it is a person in law; but this a partnership is not. On the other hand, a partnership may own, in equity, real estate, without the least reference to the legal title, it being of no importance who holds it or how he came by it, excepting so far as these facts express or reveal the intention of the partnership. (*p*) If by that intention the property is treated

(*o*) See Fall River Whaling Co. *v.* Borden, 10 Cush. 458. For cases where land was bought for special purposes, see, where the estate was bought for the purpose of supplying earth under a contract, Moreau *v.* Saffarans, 3 Sneed, 595; to build a furnace on, Ridgway's Appeal, 15 Pa. 177; for glass-works, McDermot *v.* Laurence, 7 S. & R. 438; to build a hotel on, Brownlee *v.* Allen, 21 Mo. 123; for stores for merchants, Dyer *v.* Clark, 5 Met. 562; for other purposes, Mattock *v.* Mattock, 5 Ind. 403; Roberts *v.* McCarty, 9 Ind. 16; Evans *v.* Gibson, 29 Mo. 223; Green *v.* Green, 1 Ohio, 244; Buckley *v.* Buckley, 11 Barb. 43; public-houses and lands bought by brewers, Phillips *v.* Phillips, 1 Mylne & K. 649; Morris *v.* Barrett, 3 Younge & J. 384. If necessary, and so far as is necessary, real estate purchased with partnership funds for partnership business will be treated as personalty. Hiscock *v.* Philips, 49 N. Y. 97; Pearce *v.* Covert, 39 Wis. 252; Scruggs *v.* Blair, 44 Miss. 406; Heartt *v.* Rankin, 41 Iowa, 35; Shearer *v.* Shearer, 98 Mass. 107; Drewry *v.* Montgomery, 28 Ark. 256; Little *v.* Snedecor, 52 Ala. 167; Bank of Louisville *v.* Hale, 8 Bush (Ky.), 672; Manck *v.* Manck, 54 Ill. 281; King *v.* Weeks, 70 N. C. 372; Lime Rock Bank *v.* Phetteplace, 8 R. I. 56; Nat. Bank *v.* Sprague, 20 N. J. Eq. 13. Real estate will be treated as partnership property, though situated in a State where by statute provision it is not. Tillotson *v.* Tillotson, 34 Conn. 335. A mill belonging to one partner, and credited to him in the partnership accounts at a certain value, becomes partnership property; and any rise in its value becomes partnership assets. Ashton *v.* Robinson, L. R. 20 Eq. 25. See also Waterer *v.* Waterer, L. R. 15 Eq. 402; Hogle *v.* Lowe, 12 Nev. 286. If the real estate be not purchased for the partnership business, though purchased with the partnership funds, it will be held by the respective partners as tenants in common. Russell *v.* Miller, 26 Mich. 1; Price *v.* Hicks, 12 Fla. 365. Nor is real estate not purchased with partnership funds, though used for partnership purposes, partnership property, unless there is evidence beyond the use, under an agreement, that there is an intention to make it partnership property. Alexander *v.* Kimbro, 49 Miss. 529; Frank *v.* Branch, 16 Conn. 261. [Hatchett *v.* Blanton, 72 Ala. 423.]

(*p*) In Markham *v.* Merritt, 7 How. (Miss.) 487, it was said *obiter* by Sharkey, C. J., that taking a deed as tenants in common might be held a partition of the joint fund; but see, per Story, J., in Hoxie *v.* Carr, 1 Sumner, 188, that that

by them and considered by them as partnership property, whether the intention be expressly declared and agreed by the partners, or only inferred from circumstances which do not admit of any other equally reasonable and satisfactory explanation, then it will be treated as partnership property.

§ 268. **Partnership Real Estate at Law.** — In some of our States, courts of law sit also as courts of equity; in some they are authorized to some extent to apply the rules of equity, while sitting as courts of law; and in some they have, from a kind of necessity, taken to themselves this power, and applied equity principles to such questions as those we have to consider. At the same time, the distinction is obvious and certain between the principles of law and their operation, and the principles of equity and their operation. And this distinction in some form or other is usually preserved, even by courts that administer both principles. We shall speak of them as entirely distinct.

In England, the legal title to real estate in respect to transfer and conveyance is entirely distinct from that of personal estate. In respect to inheritance, it is also different both in form and in substance; in respect to devises, it is different, but less so, practically, than in reference to the other two. In this country, the law of real estate is even more distinct from that of personal than in England, in respect to conveyance, owing to our excellent and universal system of record: but in regard to inheritance, the difference is formal only; the same persons, in nearly all instances, taking realty who would take personalty, though by a different title and process. (*q*)

§ 269. **Legal Title governed by Record.** — We should infer, therefore, that here as well as there the law would pay the utmost regard to title by deed and record. And this is always so. Thus, no partner or partners can convey any interest or title in or to real estate, not held of record in their names, although it is part-

circumstance was as evidence of intention, *per se*, very slight, and never decisive. See Wilson *v.* Hunter, 14 Wis. 683; where one of the partners who had not the legal title mortgaged land, and it was held good against subsequent mortgagees, with notice. And see Howell *v.* Howell, 15 Wis. 55.

(*q*) In Davis *v.* Christian, 15 Gratt. 11, a bill was filed for a share accrued to the complainant as husband of the daughter of a partner deceased, and one question was, whether she took such share as real or personal property; and so whether the complainant acquired the property absolutely as personal, or only a life-interest therein, as tenant by curtesy; and it was held, that the conversion of real property into personal was equitable only; but the precise question was not definitely decided. Per Sharkey, C. J., in Markham *v.* Merritt, 7 How. (Miss.) 437. See Bradbury *v.* Barnes, 19 Cal. 120, as to the right of one partner to buy another's interest in the real estate of the partnership.

nership property beyond all question. (*r*) And in all actions at law, no person can appear and rest upon his title, as plaintiff or defendant, if the title by deed on which he rests is in some one else. (*s*) And this is true of title by inheritance also. We apprehend that some of our courts might find a way to dispose of this title at law, as it would be done in equity; but it would be difficult to do this, and wherever equity powers could be exercised, it would be unnecessary. We should say, therefore, that at law the real estate of a partnership would pass to the legal heir by inheritance; that is, to the legal heir or heirs of him or them in whom was the legal title: (*t*) and that it would also pass by devise of the legal holder, although here courts of law might perhaps take a wider liberty than in the case of inheritance.

Hence, too, at law, the general rule, as to the rights and liabilities of dormant partners, is said not to apply to partnerships for the purchase and sale of land. Thus, if two are partners for such a purpose, one of whom is silent and unknown, and the other, in whose name the lands are taken and transferred, alone becomes indebted for the price, it is said that the secret partner cannot be sued for the price, on proof of his partnership, and that the purchase was made and the debt incurred for the partnership. (*v*)

But we have some doubt whether these decisions do not rest upon a recognition of a difference between land and personalty which would not now be made. The reasons which compel courts of law to regard the legal title to land by deed do not apply, or certainly not with the same force, to courts of equity. Nor do we know any among the reasons which are held sufficient in such a case to bind a secret partner when discovered, in an ordinary case of partnership, which do not apply quite as well to a case where land was a part of the partnership property. (*w*)

(*r*) Jackson *v.* Stanford, 19 Ga. 14, where one partner, holding under a conveyance to the partners by their individual names, attempted to convey the whole property, and the conveyance was held valid, only as to his moiety. See Whitman *v.* Boston & Maine R. R., 3 Allen, 133.

(*s*) Story, J., in Hoxie *v.* Carr, 1 Sumner, 173, 177, 178; Benfield *v.* Solomons, 9 Ves. 76; Harris *v.* Pollard, 3 P. Wms. 348.

(*t*) Pugh *v.* Currie, 5 Ala. 446; Lang *v.* Waring, 25 Ala. 625; Dyer *v.* Clark, 5 Met. 562; Burnside *v.* Merrick, 4 Met. 537; Dilworth *v.* Mayfield, 36 Miss. 40; Andrews *v.* Brown, 21 Ala. 437; Davis *v.* Christian, 15 Gratt. 11.

(*v*) Pitts *v.* Waugh, 4 Mass. 424; cited and followed in Gray *v.* Palmer, 9 Cal. 616.

(*w*) Though the case of Pitts *v.* Waugh is usually considered sound, as being merely at law, — see Fall River Whaling Co. *v.* Borden, 10 Cush. 485, — yet, so far as it was rested by the court on the ground of an impossibility to have a partnership dealing in land, — such partnerships being

From the regard which is necessarily paid to the legal title, it follows, as we have said, that no partner can convey any real estate, or any interest in it, but he in whose name it stands. Even equity cannot dispense with this rule. By the American law and practice all title to land must be traced along an unbroken chain of record. At every step, it must be legal title; passing, by legal conveyance, from him who has it to one capable of taking it.

§ 270. **Partnership Real Estate regarded as Personalty in Equity.** — On this point, the conflict of authorities renders it difficult to lay down a positive and certain rule. We think, however, that there is a difference between the practice of the English equity courts and our own; and this difference can be defined and explained, and the decided tendency, if not the established rule, of the courts of each country, be ascertained.

The older authorities in England are opposed to any recognition of real property as a part of the partnership stock, and the later have yielded to the pressing necessity for this acknowledgment, slowly and imperfectly. It was not until quite recently that it has been full and complete; and now it is carried further in England than it is here. We suppose the rule of those courts to be well expressed thus: "All property, whatever be its nature, purchased with partnership capital for the purposes of partnership trade, is and continues to be partnership capital, and has, to every intent, the quality of personal estate." (x) These last two clauses are, it will be noticed, quite distinct. It is one thing to say that such real estate shall be considered, in every respect, partnership property, and another thing to add that it has to every intent the quality of personal estate. It is the first thing

now universally admitted at common law — it must be considered overruled by the current of later authority; and the rule, that a dormant or secret partner of a land company cannot be charged, would seem now to rest upon feeble reasons.

(x) Mr. Bisset, in his treatise on the Law of Partnership, after a review of all the cases up to his time (1847), concludes, among other things, that "real estate, purchased with partnership property, but not for partnership purposes, is not converted into personalty; and that, though partners purchase with partnership funds the equity of redemption of mortgages devised to them, the equity of redemption follows the mortgage, and does not become partnership property." But the cases of Randall *v.* Randall, 7 Sim. 271, and Cookson *v.* Cookson, 8 Sim. 529, from which these conclusions were drawn, would seem to be overruled by Essex *v.* Essex, 20 Beav. 442, and Darby *v.* Darby, 3 Drewry, 495. See Bell *v.* Phyn, 7 Ves. 453, and Ripley *v.* Waterworth, 7 Ves. 425. In the latter case, the whole law on this point was elaborately considered, and the Vice-Chancellor held, after reviewing all the authorities, that all real estate which was added to the partnership stock, in whatever way acquired, becomes converted absolutely into personal property. See Bonner *v.* Campbell, 48 Pa. 286.

only, we suppose, which the American courts say; and the English courts say that, and then add the latter.

§ 271. **English Rule.** — There are two reasons for this English rule. One is, that the reluctance to admit real estate as by any possibility part of the partnership capital arose from the feeling that only personal property could be thus held; and therefore, when it became obvious that real estate must be acknowledged as part of the partnership property, it seemed as if this was in fact calling it personal property. The other reason is more substantial, and probably more operative. The law of inheritance is such, in England, that where a partner intended that his real estate should be partnership stock, and so treated in all respects, injustice would be done by treating it so until the partnership account was settled and terminated, and then restoring to it its character of real estate. For then the heir would take it, and all the next of kin would lose it: one child would take all, and the rest none. If the father had sold the land, and put the money into trade, all would have shared it. And if he had put his land into trade, and it must be considered that he in this way made it personal estate so far as his partners and the creditors of the firm were concerned, it would seem reasonable that he should be considered as having intended to impart to the real estate the character of personalty in all respects, and just to carry this intention into effect. (*y*) Hence, it seems to be the English rule, and is so stated in American cases which refer to it, that the real estate of a partnership does not go to the heir of a deceased partner or partners beneficially interested in it, but to his personal representatives. (*z*) The following distinction might possibly be taken: Supposing three partners, one of whom has the legal title to real estate which is partnership property, and he dies. His heir would be held as trustee for two-thirds of it (one-third to each partner), but the other third he would hold as his own. Whereas, in the same case, if one of the other partners who was thus beneficially, but not by legal title, interested in one-third, had died, the partner holding the

(*y*) See per Sharkey, C. J., in Markham *v.* Merritt, 7 How. (Miss.) 437.

(*z*) This is the conclusion of Walworth, Ch., in Buchan *v.* Sumner, 2 Barb. Ch. 199, 200; of Story, J., in Hoxie *v.* Carr, 1 Sumn. 173, 184; and Shaw, C. J., in Dyer *v.* Clark, 5 Met. 562, 578; and though this was questioned in Buckley *v.* Buckley, 11 Barb. 73–76, yet that was before the more recent cases of Essex *v.* Essex, and Darby *v.* Darby, overruling the cases which gave rise to the doubt. See *ante*, note (*x*); Callumb *v.* Read, 24 N. Y. 505. So see the same conclusion in Duhring *v.* Duhring, 20 Mo. 174. Compare, with these English cases, the case of Steward *v.* Blakeway, L. R. 6 Eq. 479.

title, or his heir, would be held as trustee, not for the heir of that deceased partner, who had only an equitable title, but for his personal representatives. We apprehend, however, that such a distinction would be regarded as theoretical only, if admitted at all; and that the English rule, for the reasons we have stated, would give to such real estate the character and qualities of personal property, as to all persons and under all circumstances.

§ 272. **American Rule.** — In this country, the rule is otherwise. Neither of the reasons above stated apply to us. There is not, and we know no reason why there should be, any reluctance to recognize as partnership property any real estate which the owners wish should be so considered. And when it has fulfilled all its functions as personal property, in respect of the partnership, the partners, and the creditors, and is no longer wanted for these, it may now become, in their hands who have the legal title, real estate, and subject to all incidents as such; because the same persons with us take the personalty and inherit the realty, and it will be much simpler and easier for them to take at once as realty that which is realty. The following, then, is the American rule: Real estate, purchased and held as partnership property, is so treated in equity, and subjected to all the incidents of partnership property. If there be death, the surviving partner, whether he hold the whole title, or hold it in part, or hold none of it, if he be a creditor of the partnership, has the same rights against the real estate, and only the same, which any other creditor has. (*a*) But this real estate goes to pay the debts of the partnership, and only after they are paid does it, or what is left of it, become the property of the partners, or their representatives, free from all claims; and then it is divided between them just as so much money capital would be. But it then becomes at once real estate; or, rather, all the incidents and qualities of real estate revive.[1] This rule goes upon

(*a*) Delaney *v.* Hutcheson, 2 Rand. 183; Gray *v.* Palmer, 9 Cal. 616; Roberts *v.* McCarty, 9 Ind. 16. Abbott's Appeal, 50 Pa. 234. In Pennsylvania, if the partners take a deed of real estate as tenants in common, this fixes the character of the property as to creditors; and, in distribution, private and partnership creditors are paid *pari passu*. Appeal of Second Nat. Bank, 83 Pa. 203. See also Ebbert's Appeal, 70 Pa. 79.

[1] It seems to be well established in this country, in accordance with the doctrine stated in the text, that real estate owned by a partnership is converted into personalty only for the purpose of settling the partnership affairs, by paying the debts and adjusting the accounts of the partners. Riddle *v.* Whitehill, 135 U. S. 621; *In re* Codding, 9 F. R. 849; Abernathy *v.* Moses, 73 Ala. 381; Strong *v.* Lord, 107 Ill. 25; Harris *v.* Harris, 153 Mass. 439, 26 N. E. 1117; Foster's Appeal, 74 Pa. 391. An agreement between the partners may, however, show that the land has been equitably converted

the ground of a trust imposed upon all who hold the legal title,

intopersonalty. Thus where it was agreed that upon the death of a partner a valuation of his share should be made, and the survivor upon paying the amount should take all the assets, it was held that the purchase-money thus paid by the survivor should be distributed as personal estate. Maddock *v.* Astbury, 32 N. J. Eq. 181. So where it was provided by the articles that the firm should not be dissolved by death, but should continue, the interest of a deceased partner is personalty for purposes of distribution. Leaf's Appeal, 105 Pa. 505. A peculiar doctrine prevails in Kentucky. The general rule is the same that prevails elsewhere ; the land is converted into personalty only for the purposes of the partnership. Lowe *v.* Lowe, 13 Bush, 688. But an agreement to convert the land into personalty is implied when land is bought for the incidental purposes of the partnership. Cornwall *v.* Cornwall, 6 Bush, 369. The question whether the purchase is incidental, and so the land is converted, or is for the purpose of dealing with the land as real estate, is to be determined according to the intention of the partners at the time of the purchase, not according to the use actually made of the land. Holmes *v.* Self, 79 Ky. 297 ; Flanagan *v.* Shuck, 82 Ky. 617.

Where the object of a farming partnership was to buy land, carry on farming operations till the land was paid for, and then own the land in common, it was said that the land was not converted into personalty even for the purpose of paying creditors. Berry *v.* Folkes, 60 Miss. 576. A more exact statement of the case would probably be that the land was never the property of the partnership. The purpose of the partnership was merely to cultivate the land, and the use only of the land was contributed. See *ante*, § 265, note *ad fin.*

How far the English doctrine differs from the American is not clear. The interest of a deceased partner in real estate of a partnership is recognized as personalty in so far that a probate duty, which is payable only on personal property, is due upon it. Attorney-General *v.* Hubbuck, 13 Q. B. D. 275 (C. A.). And where land was conveyed to two partners, for the partnership, as joint tenants, it was held that there was no survivorship. Davies *v.* Games, 12 Ch. D. 813. But on the other hand, a devise to charity of an interest in a partnership, a large part of whose assets is land, is within the mortmain acts ; being a charge upon land, if not strictly an interest in it. Ashworth *v.* Munn, 15 Ch. D. 363 (C. A.). And it has even been intimated that the sale of an interest in a partnership formed to deal in lands is the sale of an interest in lands, and within the Statute of Frauds. Gray *v.* Smith, 43 Ch. D. 208 (C. A.).

The whole discussion, whichever view is adopted, seems to proceed upon a mistaken theory. Land of a partnership is not in truth converted into personalty either for one purpose or for all purposes. So far as the partnership is concerned, it is partnership land, and is treated as land. Thus, it may be taxed to the firm as land, Hubbard *v.* Winsor, 15 Mich. 146 ; and if a judgment is obtained against the firm, it becomes a judgment lien on the land. *In re* Codding, 9 F. R. 849 ; Lauffer *v.* Cavett, 87 Pa. 479 ; Pitts *v.* Spotts, 86 Va. 71, 9 S. E. 501.

When the affairs of the partnership are undergoing settlement, the land is among the assets of the partnership, to be disposed of first in payment of the debts. If any is left, it is to be devoted, like the personalty, to repaying the capital and advances of the partners ; and neither partner can claim it till these matters are adjusted. Wiegand *v.* Copeland, 14 F. R. 118 ; Mendenhall *v.* Benbow, 84 N. C. 646 ; Betts *v.* Letcher (S. Dak.) 46 N. W. 193 ; Lane *v.* Jones, 9 Lea, 627 ; Diggs *v.* Brown, 78 Va. 292. If any land remains after this, it is to be divided among the partners, like the remaining personalty. If the land has been sold, but a part of the proceeds remain, it is to be divided in the same way. Powers *v.* Robinson, 90 Ala. 225, 8 So. 10.

As to the individual partners, they, as we have seen, have no interest in the land, or in any specific property. Their only right is a claim against the partnership for a distributive share of a final balance ; and this claim is of course personalty. If any land remains after the debts are paid, it is still necessary to adjust the accounts of the

in behalf of all partnership objects; and that trust once discharged, the residue resumes its former character. (*b*)

(*b*) Dyer *v.* Clark, 5 Met. 562; Burnside *v.* Merrick, 4 Met. 537; Howard *v.* Priest, 5 Met. 582; Peck *v.* Fisher, 7 Cush. 386; Rice *v.* Barnard, 20 Vt. 479; Goodburn *v.* Stevens, 5 Gill, 1; Galbraith *v.* Gedge, 16 B. Mon. 631; Buckley *v.* Buckley, 11 Barb. 43; Holland *v.* Fuller, 13 Ind. 195, 199; Mattock *v.* Mattock, 5 Ind. 403; Buchan *v.* Sumner, 2 Barb. Ch. 165; Boyers *v.* Elliott, 7 Humph. 204; Tillinghast *v.* Champlin, 4 R. I. 173; Lancaster Bank *v.* Myley, 12 Pa. 544; Sumner *v.* Hampson, 8 Ohio, 358; Greene *v.* Greene, 1 Ohio, 244; Coster *v.* Clarke, 3 Edw. Ch. 428; Lang *v.* Waring, 25 Ala. 625; Jones *v.* Neale, 2 Pat. & H. 339; Hanff *v.* Howard, 3 Jones Eq. 440; Collins *v.* Warren, 29 Mo. 236; Wesson *v.* Washburn Iron Co., 13 Allen, 95; Shearer *v.* Shearer, 98 Mass. 107; Foster *v.* Barnes, 81 Pa. 377, Pierce *v.* Covert, 39 Wis. 252; [Brewer *v.* Browne, 68 Ala. 210; Espy *v.* Comer, 76 Ala. 501.] But in Pierce *v.* Trigg, 10 Leigh, 406, it was held, by Tucker, J., that the purchase of real property with partnership funds and for partnership purposes, converted it absolutely into personalty. The court say: "It ought to replace the fund withdrawn from the personal estate. By placing it as stock in the partnership, the deceased evinced a design to treat it as personalty, and it ought to go accordingly. The representatives of the deceased can claim it only as stock; and as stock in trade it is, *ex vi termini*, personal. And, accordingly, the widow's dower was denied to her thereout, although the partnership was solvent." The court were not unanimous in this opinion. No other American decision has,

partners with the firm, and the land is therefore not yet individual property. And even after these accounts have all been settled, and land belonging to the firm remains in the form of profits to be divided, the partners would, strictly speaking, have no individual property in the land before an actual division. But if they already own the legal title to the land in common, the formality of a division is unnecessary, and the partners would be held to own the land individually. A partner might therefore get individual title to partnership land in one of two ways; first, by an actual setting out and conveyance of a portion of the land to him, by way of distribution of the profits or otherwise; second, by the fact that land which is proper for distribution among the partners is already legally theirs in the proportion to which on distribution they are entitled. It is needless to say that when land comes in this way to a partner, it comes as real estate and not as personalty. See Ruckman *v.* Decker, 23 N. J. Eq. 283.

The same is true if in consequence of the death of a partner his distributive share is handed over to his representatives. If the survivor chooses to distribute the assets of the firm in the shape of land, it goes to the proper representatives of the deceased partner as real estate, with all the incidents of real estate; if, on the other hand, no land remains after settling the affairs of the partnership, the balance, when paid over, is received by the representatives of the deceased as personalty. Until the balance is thus paid over, the representatives of the deceased have no interest in the specific property. Roulston *v.* Washington, 79 Ala. 529. See Little *v.* McPherson, 76 Ala. 552 (personal property). But since the surviving partner when dealing with the partnership land is dealing with equitable rights, and may require the assistance of a court, it would seem proper that he should first exhaust the personal assets before dealing with the land. If that is true, land of a partnership dissolved by death would go to the representatives of the deceased as real estate, unless the personalty was insufficient to pay the debts, including the claims of the survivor. It would follow that the share of the deceased, in whatever form paid over, should be regarded as real estate for the purpose of distributing the estate of the deceased, up to the value of the deceased partner's share in the partnership lands supposing them to be owned in common. It seems that the duty of the survivor is thus to exhaust the personal assets before coming upon the realty. Walling *v.* Burgess, 122 Ind. 299, 22 N. E. 419; *post*, § 273, n. (*h*). But see *contra*, Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243.

§ 273. **Dower in Partnership Real Estate.**—The English rule would seem to cut this off. (*c*) But in this country it is quite well settled that while dower yields to the claims of partnership creditors, whether they are of the firm or strangers, and therefore cannot be granted until all the partnership debts are paid or secured, yet, when this is accomplished, as the land is treated in the same way as if it had never entered into partnership property, dower revives. (*d*) But the widow should be made a party to any bill for an account or for a sale of the real property to pay debts. (*e*) Otherwise, the purchaser might be liable to the widow's claim for dower. (*f*) [1]

it is believed, maintained this doctrine; and the later cases in Virginia, Davis *v.* Christian, 15 Gratt. 11, and Jones *v.* Neale, 2 Pat. & H. 339, treat the point as doubtful, a decision thereon being unnecessary. See *ante*, § 268, note (*q*). On the other hand, *dicta* occur going to sustain an absolute conversion in the case of a purchase of land, under a stipulation for resale, made either at the time, or agreed upon in the partnership articles. Ludlow *v.* Cooper, 4 Ohio St. 1; Buck *v.* Winn, 11 B. Mon. 320; Divine *v.* Mitchum, 4 B. Mon. 488; Galbraith *v.* Gedge, 16 B. Mon. 631, 635; Thayer *v.* Lane, Walk. Ch. 200; but in none of these cases is the point decided. See Dewey *v.* Dewey, 35 Vt. 555. As to what joinder of interest is necessary to make a partnership in lands, see White *v.* Fitzgerald, 19 Wis. 480.

(*c*) Houghton *v.* Houghton, 11 Sim. 491; Morris *v.* Kearsley, 2 Younge & C. 139.

(*d*) Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, 5 Met. 582; Coster *v.* Clarke, 3 Edw. Ch. 238; Galbraith *v.* Gedge, 16 B. Mon. 631; Goodburn *v.* Stevens, 5 Gill, 1; Smith *v.* Jackson, 2 Edw. Ch. 28. Thus, if the firm become insolvent, the widow loses dower. Greene *v.* Greene, 1 Ohio, 244; Duhring *v.* Duhring, 20 Mo. 174. There is no dower in the real estate of a partnership, till the adjustment of partnership accounts; and any sale, whether by mortgage, or on execution, or by decree of court, will bar dower. Simpson *v.* Leach, 86 Ill. 286; Uhler *v.* Semple, 20 N. J. Eq. 288; Willett *v.* Brown, 65 Mo. 138. On the other hand, if the property passes out of the partnership to a stranger, as he is not privy to the trust, but holds the estate discharged thereof, the widow can claim dower of the vendee, as the holder of the legal estate; nor can he avail himself of the fact that the land was partnership property, as the trust is wholly gone. Markham *v.* Merritt, 7 How. (Miss.) 437. In Tennessee, it is held, that, in consequence of the act abolishing joint tenancy, Stat. 1784, ch. 22, land of the partnership, bought with its funds and used for its purposes, unless within the exception in favor of "useful trade," &c., will have every attribute of real property, and descend to the heir, and not go to the personal representatives. McAllister *v.* Montgomery, 3 Hayw. 94; Yeatman *v.* Woods, 6 Yerg. 20; Piper *v.* Smith, 1 Head, 93. In Virginia, on the other hand, it was held, in Pierce *v.* Trigg, 10 Leigh, 406, that real estate which became stock was entirely converted into personalty, and the widow could take no dower. But this decision seems questioned in Davis *v.* Christian, 15 Gratt. 11.

(*e*) Pugh *v.* Currie, 5 Ala. 446.

(*f*) Thus, in Collins *v.* Warren, 29 Mo. 236, as this was not done, the survivor was not allowed to recover from the widow, in an action of ejectment, more than an undivided moiety of the real estate.

1 In accordance with the principles already stated, a widow can of course have no dower in the land which, because of the unsettled affairs of the firm, still remains partnership land. *In re* Ransom, 17 F. R. 331; Paige *v.* Paige, 71 Ia. 318, 32 N. W.

§ 274. **Inheritance of Partnership Real Estate.**—The heir always takes the real estate in order to support the legal title, and is then held as trustee for all those purposes to which the land must be devoted in order to make it effectually partnership property; (*g*) having, however, the right to require that the real property shall not be sold to pay debts until all the personal property is exhausted. (*h*) When these are all fulfilled, he then holds it discharged from claim, precisely as if it had never been otherwise. (*i*) If land be conveyed to partners, in fact as partnership property, but in form to them as tenants in common, and one dies, his heir becomes tenant in common with the other partners. (*j*) Here, as before, he holds as trustee for the partnership until this trust is discharged, and then for himself. And it is said in England, that, in such a case, if the heir has a beneficial as well as legal interest, dower would be allowed. (*k*) Here it certainly would be as soon as the estate were cleared from all liability for the debts of the partnership. [1]

(*g*) See *ante*, § 264, note (*c*); § 269, note (*t*).

(*h*) Lang *v.* Waring, 25 Ala. 625. So the heirs must be parties when a sale is sought for payment of firm debts. Pugh *v.* Currie, 5 Ala. 446; Lang *v.* Waring, 25 Ala. 625; Andrews *v.* Brown, 21 Ala. 437.

(*i*) Dyer *v.* Clark, 5 Met. 562. See also preceding note, and cases cited.

(*j*) See preceding notes.

(*k*) See *ante*, notes (*h*), (*i*).

360; Hamilton *v.* Halpin, 68 Miss. 99, 8 So. 739; Pierce *v.* Trigg, 10 Leigh, 406; Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325; Martin *v.* Smith, 25 W. Va. 579. And where the land is sold to pay firm debts, the widow cannot claim dower against the purchaser. Willet *v.* Brown, 65 Mo. 138. See, however, Clay *v.* Field, 34 F. R. 375. In Bowman *v.* Bailey, 20 S. C. 550, it was held that the widow of a partner might claim dower against a purchaser from the firm, the firm creditors not being interested in the controversy.

Where the debts of the firm are all paid, and a balance remains in the shape of land, the widow has dower. Brewer *v.* Browne, 68 Ala. 210; Lenow *v.* Fones, 48 Ark. 557, 4 S. W. 56; Strong *v.* Lord, 107 Ill. 25. It has been held that where the real estate of one partner was used and improved by the firm, the widow has no claim to dower in the improvements, for they are personalty of the firm. Grissom *v.* Moore, 106 Ind. 296, 6 N. E. 629.

[1] There is no survivorship of the partnership real estate at law; the legal title goes to the heir of the deceased partner. Abernathy *v.* Moses, 73 Ala. 381; Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760; Percifull *v.* Platt, 36 Ark. 456; Baker *v.* Middlebrooks, 81 Ga. 491, 8 S. E. 320; Carter *v.* Flexner (Ky.) 17 S. W. 851. Though there is survivorship of the title of a leasehold interest, owned by the firm, since that is personalty. Oram *v.* Rothermel, 98 Pa. 300. The heir, however, takes the title in trust for the firm. Logan *v.* Greenlaw, 25 F. R. 299; Clay *v.* Field, 34 F. R. 375; Merritt *v.* Dickey, 38 Mich. 41; Willet *v.* Brown, 65 Mo. 138.

Since the surviving partner has the right of disposing of the assets to pay the debts and settle the accounts of the firm, he alone may make a valid conveyance of the partnership land. Although he cannot convey the legal title, he disposes of the entire equitable interest; and the purchaser may have a conveyance from the heir of the deceased partner by filing a bill in equity. The state of the legal title to the land is

If lands are conveyed to partners in fact as partnership property, but in form as joint tenants, equity will not permit any survivorship, but will treat it as if the grantees had held it as tenants in common. (*l*)

§ 275. **Devised Lands, whether different.** — There seems to be some disposition in England to make some distinction between lands bought by partnership funds for partnership purposes, and those which are *devised* to partners for the same purpose. (*m*) We doubt, however, whether it would be carried out and fully applied in England. If a father, for example, having two sons who were partners, devised to them lands either as tenants in common or as joint tenants, but certainly as partners and for partnership purposes, we think equity would use the legal title for partnership purposes in the same manner as if it had been bought by the partners and paid for by money bequeathed to them. We are quite confident such would be the rule in this country. (*n*) It has been held in England, where mortgages were devised to partners and

(*l*) This equitable interference is more usual in England than in this country, Broom *v.* Broom, 3 Mylne & K. 443; Morris *v.* Kearsley, 2 Younge & C. 139; Houghton *v.* Houghton, 11 Sim. 491; Fereday *v.* Wightwick, 1 Russ. & M. 45; as the statutes of most of the United States have changed joint tenancies into what are practically tenancies in common, by abolishing the right of survivorship. See 1 Washburn on Real Property, 408, where the several State statutes are referred to at length. The American courts generally have declared the same equitable rule. Delaney *v.* Hutcheson, 2 Rand. 183; Thayer *v.* Lane, Walk. Ch. 200; Dyer *v.* Clark, 5 Met. 562; Sumner *v.* Hampson, 8 Ohio, 328; Duhring *v.* Duhring, 20 Mo. 174; Evans *v.* Gibson, 29 Mo. 236; Carlisle *v.* Mulhern, 19 Mo. 56; [Davies *v.* Games, 12 Ch. D. 813].

(*m*) Phillips *v.* Phillips, as stated in Bisset on Part. 50.

(*n*) Dyer *v.* Clark, 5 Met. 562; Burnside *v.* Merrick, 4 Met. 537; Howard *v.* Priest, 5 Met. 582.

immaterial. The power of the survivor is just as great if the entire legal title was in the deceased, in trust for the firm. Shanks *v.* Klein, 104 U. S. 18; Allen *v.* Withrow, 110 U. S. 119; Espy *v.* Comer, 80 Ala. 333; Davis *v.* Smith, 82 Ala. 198, 2 So. 897; Breen *v.* Richardson, 6 Col. 605; Van Staden *v.* Kline, 64 Ia. 180, 20 N. W. 3; Riley *v.* Carter, (Md.) 25 Atl. 667; Hanson *v.* Metcalf, 46 Minn. 25, 48 N. W. 441; Matthews *v.* Hunter, 67 Mo. 293; Easton *v.* Courtwright, 84 Mo. 27. Consequently a creditors' bill against the survivor need not make the heir a party. Logan *v.* Greenlaw, 25 F. R. 299. Nor is he a necessary party to a bill for an account between the executor of the deceased partner and the survivor. Van Aken *v.* Clark, 82 Ia. 256, 48 N. W. 73. But if one of the objects of the bill is to secure a conveyance of the legal title, the heir is of course a necessary party. Abernathy *v.* Moses, 73 Ala. 381.

Since the power of the surviving partner over the land is a result of the equity of the firm, he can convey no interest in the land by a proceeding which is not approved by a court of equity; as by making a mortgage which operates as a preference to a creditor. Espy *v.* Comer, 80 Ala. 333. So by mortgaging to secure his individual debts. Brown *v.* Watson, 66 Mich. 223, 33 N. W. 493.

After the partnership affairs have been settled, and real estate remains, the heir of the deceased partner takes it and not his executor. Martin *v.* Morris, 62 Wis. 418, 22 N. W. 525. But see *In re* Ransom, 17 F. R. 331.

they bought the equities of redemption, thus completing title in themselves, the land was not partnership property, nor to be treated as personal property. The case was perhaps well decided on its facts. (*o*) But we believe no rule exists in England, and certainly none in this country, that real estate so acquired should not be considered partnership property, if it was intended so to be, and was so treated, by the parties interested.

§ 276. **Right of Creditors of the Firm to its Real Estate.** — This right whenever it arises, as will be inferred from what has been said, is the same as it is to the personal estate of the partnership. But it must be worked out by the power of equity to hold the legal owner as trustee for those who are beneficially interested. A question of some importance, at least in this country, arises, as to when the creditors' right to real estate may be enforced. It is this: Have the creditors of a firm, in equity, under all circumstances the same right to the real estate that they have to the personal estate of the firm; or have they only a right to resort to the real estate if the personal estate prove to be insufficient to pay the debts? The difference might be a very important one in this country, so far at least as dower is concerned. It might, indeed, be for the interest of the heir to have the land of a partnership appropriated in the first place to pay the debts. If the firm were insolvent it would made no difference. (*p*) If not, the heirs would lose the land, but would save from the surplus of personal just as much as they would lose in the land, and would take it free from the encumbrance of dower. But, in such a case, a court of equity applied a similar rule to that which obtains in the settlement of an estate of a deceased person. (*q*) The personal estate is applied to the payment of debts in the first place; if that be exhausted and insufficient, then so much of the real estate is so applied as may be necessary. And so it is in case of partnership; and therefore the

(*o*) Phillips *v.* Phillips, Bisset on Part. 50. This case has not been questioned in any decision that we are aware of, and is recognized by Mr. Lindley, Law of Part. pp. 553, 554, though, it seems, with some hesitation; and it is certainly against the broad rules given by him as the result of the English authorities. [See Railsbach *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504].

(*p*) But see, in Lang *v.* Waring, 25 Ala. 625, that the heirs are not cut off from all defence, even by insolvency of the firm. Where a partner mortgages partnership real estate to secure his individual debts, the partnership creditors must first be paid before the private creditors can take the property, or any part of it, by foreclosure. Conant *v.* Frary, 49 Ind. 530.

(*q*) The doctrine of marshalling assets will always be applied in cases where the aid of equity is claimed to reach a fund, by one who has recourse to two funds in the same right; that is, the creditor will be compelled to resort to that fund which he alone has recourse to, and exhaust it, before he can subject the other to his demand. Adams' Eq. 271, 274, and cases cited; Bardwell *v.* Perry, 19 Vt. 292; and, generally, cases cited *ante*, § 256, note (*u*).

whole real estate of a partnership, if none of it were wanted for payment of debts or partners' shares, would be as unaffected in equity as at law; and, if part of it were so wanted, that part only would be treated as personal property, leaving the residue untouched. (*r*)[1]

§ 277. **Right and Power of the Partners as to the Real Estate.** — This seems to be, in equity, entire and complete, so far as the payment of debt goes; and, after that payment, so far as the adjustment of the mutual claims or balances of the partners is

(*r*) In case of dissolution by the death of a partner holding title to the firm's real estate, neither the survivor nor the partnership creditors can claim the aid of a court of equity to compel the widow and heirs to release their rights, until the personal assets are exhausted. Lang *v.* Waring, 25 Ala. 625, correcting Andrews *v.* Brown, 21 Ala. 437. As to the right of partnership creditors, when the real assets are requisite to a full satisfaction of their debts, to call upon the heirs and widow to convey and release their rights, through the medium of assent to a sale by the survivor, see Sumner *v.* Hampson, 8 Ohio, 328; Lang *v.* Waring, *supra;* Pugh *v.* Currie, 5 Ala. 446; Davis *v.* Christian, 15 Gratt. 11; Duhring *v.* Duhring, 20 Mo. 174; Carlisle *v.* Mulhern, 19 Mo. 56; Richardson *v.* Wyatt, 2 Desaus. 471; Dillon *v.* Brown, 11 Gray, 179. In the cases where an apparent right has been given to the survivor to call upon the heir peremptorily to convey, it will always, we think, be found that the land was needed to pay the debts of the firm. Pugh *v.* Currie, 5 Ala. 446; Sumner *v.* Hampson, 8 Ohio, 328. And the case of Andrews *v.* Brown, 21 Ala. 437, which seemed to disregard this rule, was overruled on this point by Lang *v.* Waring, 25 Ala. 625.

[1] The firm creditors may come upon the land of the partnership; and they have priority over the separate creditors of a partner, even if the land is in the name of that partner only. Neither the partner himself nor his creditors have any right to the land as against the firm creditors. Wiegand *v.* Copeland, 14 F. R. 118; Ames *v.* Ames, 37 F. R. 30; Paige *v.* Paige, 71 Ia. 318, 32 N. W. 360; Mallory *v.* Russell, 71 Ia. 63, 32 N. W. 102; Smith *v.* Jones, 18 Neb. 481, 25 N W. 624; Messer *v.* Messer, 59 N. H. 375; Ross *v.* Henderson, 77 N. C. 170; Page *v.* Thomas, 43 Oh. St. 38, 1 N. E. 79; Chalfant *v.* Grant, 3 Lea, 118; Diggs *v.* Brown, 78 Va. 292; Hardy *v.* Norfolk M'f'g Co., 80 Va. 404. So a mortgage of the land by the partner in whose name it stands, to secure a pre-existing individual debt, is postponed to a later accruing firm claim. Norwalk Nat. Bank *v.* Sawyer, 38 Oh. St. 339. The creditors may maintain a bill in equity to reach the land and have it applied to their debts; and this is their appropriate remedy. Wiegand *v.* Copeland, 14 F. R. 118; Ames *v.* Ames, 37 F. R. 30; Golden State & M. Iron Works *v.* Davidson, 73 Cal. 389, 15 Pac. 20. And where a partner in whose name it stands sells partnership land and invests the proceeds in other land, the creditors may reach and apply to their debts the newly purchased land. Chalfant *v.* Grant, 3 Lea, 118.

A transfer by one partner of his legal title to the partnership land does not affect the right of the firm creditors to secure payment out of the land. Conant *v.* Frary, 49 Ind. 530; Hiscock *v.* Phelps, 49 N. Y. 97; Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228; Lewis *v.* Anderson, 20 Ohio St. 281; Norwalk Nat. Bank *v.* Sawyer, 38 Ohio St. 339; Jones *v.* Smith, 31 S. C. 527, 10 S. E. 340; Cunningham *v.* Ward, 30 W. Va. 572, 5 S. E. 646. For this reason such a transfer cannot be in fraud of creditors, and they have no right to complain of it or to have it enjoined. Jones *v.* Smith, 31 S. C. 527, 10 S. E. 340; Cunningham *v.* Ward, 30 W. Va. 572, 5 S. E. 646.

concerned. (*s*) But there is a limitation as to the power of a partner over this real estate, which is this: No partner and no proportion of the partners, can sell or transfer the real estate of the firm — outright for money, or by way of mortgage to secure a debt, or to assignees in trust for debts — without the consent and authority of the other partners. The first point — that he who happens to have the legal title cannot sell the real estate without the consent and authority of the rest, so as to give title to a grantee having notice — is evidently the law. And if he make a mortgage to secure a debt, or an assignment in trust for creditors, by which the legal title would pass, equity will not sustain the transaction, even supposing it free from the taint of fraud. (*t*) It would seem, therefore, that the power of a partner over the real estate of the firm is less than that over the personal estate. He may contract debts and make contracts which will indirectly reach the realty, because this must finally be subject to the debts of the firm. But he cannot directly convey or appropriate it, excepting so far as he has the legal title in himself; and then a purchaser with knowledge, or the means of knowledge, takes the land subject to all the equities of the partners. (*u*) [1] And, by the

(*s*) Dilworth *v.* Mayfield, 36 Mo. 40; Andrews *v.* Brown, 21 Ala. 437; Lang *v.* Waring, 25 Ala. 625; Pugh *v.* Currie, 5 Ala. 446; Davis *v.* Christian, 15 Gratt. 11; Shearer *v.* Paine, 12 Allen, 289.

(*t*) Hanff *v.* Howard, 3 Jones Eq. 440; Baldwin *v.* Johnson, Saxt. Ch. 441.

(*u*) Forde *v.* Herron, 4 Munf. 316; per Walworth, Chancellor, in Buchan *v.* Sumner, 2 Barb. Ch. 175, 198.

[1] A partner has no power to convey the real estate of the firm. Piatt *v.* Oliver, 3 McLean, 27; Anderson *v.* Tompkins, 1 Brock. 456; Brunson *v.* Morgan, 76 Ala. 593; Tapley *v.* Butterfield, 1 Met. 515; Berry *v.* Folkes, 60 Miss. 576; Coles *v.* Coles, 15 Johns. 159. And he therefore cannot mortgage the real estate, even to secure a firm debt. Printup *v.* Turner, 65 Ga. 71. Nor can he make a binding agreement to convey land to an employee in lieu of wages. Berry *v.* Folkes, 60 Miss. 576. There must generally be a special authority, delegated to one partner, to give validity even to an executory contract for the sale of land employed in the partnership business. Lawrence *v.* Taylor, 5 Hill, 107. But where a partnership is formed to deal in land one partner may make a valid contract for the sale of land, since that is the regular course of the business. Thompson *v.* Bowman, 6 Wall. 316; Rovelsky *v.* Brown, 92 Ala. 522, 9 So. 182; Chester *v.* Dickerson, 54 N. Y. 1.

If a partner attempts to convey the real estate of the firm, his deed is good as against himself only; it passes such part of the land as may finally come to him upon distribution. Elliott *v.* Dycke, 78 Ala. 150; Printup *v.* Turner, 65 Ga. 71.

If the other partners consent, however, the deed of a single partner is effective to convey partnership land. Sullivan *v.* Smith, 15 Neb. 476, 19 N. W. 620; Stroman *v.* Varn, 19 S. C. 307; Salinas *v.* Bennett, 33 S. C. 285, 11 S. E. 968; Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440; Rumery *v.* McCulloch, 54 Wis. 565, 12 N. W. 65. Such assent or authority may appear by express contract; as where the articles of an association to deal in lands provide that deeds shall be executed by the president and secretary. Batty *v.* Adams Co., 16 Neb. 44, 20 N. W. 15. Or the authority may

same principle, it is held, in England, that the contracts of a partner about the land of the firm — as for its sale, for example — have no force, unless they are made with the consent and by the authority of the firm. If this were shown, however, although not in such a way as to give any interest or right or remedy at law, equity would undoubtedly enforce the contract, if it were itself legal.

A different question arises when a partner does not undertake to dispose of the property or interest of the firm in the real estate, but sells his own interest in it to a stranger. This it has been held he may do, and that the sale is valid as against his copartners, although it would not be valid as against the creditors of the firm. (*uu*)

A sale of partnership real estate by order of court, to pay the debts of a deceased partner, conveys only his interest as partner, although the whole legal title was in the deceased. (*uuu*)

§ 278. **Conveyances of Partnership Land to Strangers.** — We have repeatedly remarked that the law respects and upholds the legal title to land by deed and record. Nor will equity disregard or supersede this in relation to innocent purchasers. Thus, if land which certainly belongs to a partnership is held in the name of one partner, and he conveys it for value to a person who has no knowledge, or reasonable means of knowlege, that it belongs to the firm, such person, we have seen, will hold it as against the firm.[1] Of this there can be no doubt, and as little that if the

(*uu*) Treadwell *v.* Williams, 9 Bosw. 649.

(*uuu*) M'Cormick's Appeal, 57 Pa. 54.

appear from circumstances; as where a firm took real estate in settlement of a debt, intending to sell it at once, and title was taken in the name of one partner. It was held that he had authority to convey it. Paton *v.* Baker, 62 Ia. 704, 15 N. W. 586. So where the deed was made by one partner in the presence and with the acquiescence of the others. Ferguson *v.* Hanauer, (Ark.) 19 S. W. 749; Greer *v.* Ferguson (Ark.), 19 S. W. 966. Where a partner absconded with all the available personal assets of the firm, it was held that the copartner was authorized to convey the real estate for the benefit of creditors. Sullivan *v.* Smith, 15 Neb. 476, 19 N. W. 620.

It was held in Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549, that one partner may maintain an action to eject an intruder from land owned by the partnership.

[1] There is no doubt that a conveyance of the legal title to a purchaser for value of partnership land, without notice of the partnership claim, gives him a valid title as against either the partners or the firm creditors. McNeil *v.* Congregational Society, 66 Cal. 105; McMillan *v.* Hadley, 78 Ind. 590; Tarbell *v.* West, 86 N. Y. 280; Kepler *v.* Erie Dime Savings & Loan Co., 101 Pa. 602. So an innocent mortgagee of the partner who holds legal title is protected. Seeley *v.* Mitchell, 85 Ky. 508, 4 S. W. 190; Priest *v.* Chouteau, 85 Mo. 398. The proper method of spreading upon the record notice of the firm's right to land would seem to be to put the land in the names

grantee knew, or had sufficient means of knowing, that it belonged to the firm, his title will be annulled, or he will be charged, as trustee for the firm. (v) It is a much more difficult question whether such innocent purchaser holds the property as against creditors. In the absence of decisive authority, we should say, on general principles, that he would. If a partner sells a part of the merchandise of his firm, fraudulently against the firm or its creditors, but apparently in due course of business, so as to excite no suspicion, and give no notice to the purchaser, we should say that the purchaser would hold it both as against the firm and their creditors. On similar grounds, we should say that a regular transfer of land, for value to an innocent stranger, would give him title against the firm and the creditors of the firm, although the firm were insolvent, and the sale fraudulent on the part of the partner selling.

(v) M'Dermot *v.* Laurence, 7 S. & R. 438; Forde *v.* Herron, 4 Munf. 316; Walworth, Chancellor, Buchan *v.* Sumner, 2 Barb. Ch. 198; Tillinghast *v.* Champlin, 4 R. I. 173, 209; per Shaw, C. J., in Dyer *v.* Clark, 5 Met. 562, 580. In some cases in Pennsylvania, a different doctrine prevails. In the earliest case, M'Dermot *v.* Laurence, Tilghman, C. J., carefully guarded against the case where the purchaser had reasonable means of knowledge; but in Hale *v.* Henrie, 2 Watts, 145, the court, Gibson, C. J., absolutely excluded evidence showing a clear knowledge of the partnership equities, holding that the purchaser need only rely on the registered title; and his decision was sustained by the court in bank. In the later cases of Kramer *v.* Arthurs, 7 Barr, 165, and Ridgway's Appeal, 15 Pa. 177, the same doctrine was recognized. But see Moderwell *v.* Mullison, 21 Pa. 257, Coder *v.* Huling, 27 Pa. 84, where this doctrine seems somewhat qualified. Where, as is generally the case, the purchaser is a creditor of one partner, it seems held, that he will be postponed to the demands of the partnership, — both creditors' and partners' claims, — notwithstanding the recorded title. Edgar *v.* Donnally, 2 Munf. 387; Jarvis *v.* Brooks, 27 N. H. 36; Hanff *v.* Howard, 3 Jones, Eq. 440; Tillinghast *v.* Champlin, 4 R. I. 173.

of A. B. and C., as they are partners in the firm of A. B. & Co. A conveyance to three in certain shares, "such being their interests in" a certain firm, has been held not to be notice that the land was partnership land. Van Slyck *v.* Skinner, 41 Mich. 186, 1 N. W. 971. It would seem clear that even though there is no notice on the records of the claim of the partnership, a creditor of an individual partner in whose name the land stands cannot hold the land against firm creditors. Crooker *v.* Crooker, 46 Me. 250; Jarvis *v.* Brooks, 27 N. H. 37. The rule in Pennsylvania is, however, *contra*, Ridgway's Appeal, 15 Pa. 177.

CHAPTER XII.

OF DISSOLUTION.

§ 279. **Duration of Partnership.**—When a partnership is formed, the partners may determine at their pleasure what its duration shall be. A partnership, having once begun, will be persumed to continue until there is some evidence of its termination. (*a*) And, even after a dissolution, the partnership, or at least a kind of community of interest, of power, and of liability, continues, as we shall see, for some purposes, and for so long a time as is necessary to carry those purposes into effect. In general, however, we may say that a partnership ends by its dissolution. And we will now proceed to consider the subject of dissolution of partnership; and, particularly, how many ways there are in which a partnership may be dissolved, and what are the effects of each kind of dissolution.

Dissolution of partnership takes place in seven different ways: 1. By the provision of the articles. 2. By the will of all the partners. 3. By act of one or more of the partners alone. 4. By a change in the partnership. 5. By the death of a partner. 6. By decree of a court of equity. 7. By bankruptcy.

§ 280. **Partnership for Term of Years.**—Perhaps there is no one thing more frequently provided for by the articles than the duration of the partnership. Where this is done in a simple form, as by the mere statement that "this partnership shall continue for the period of five years from this date," there can be no question about its meaning, and none about its legal obligation. When that period expires, or the time for dissolution arrives, the partnership dies, of course. It may be continued by agreement, and often is; but this is, in fact, a new partnership. And the old articles are of use only as evidence to assist in determining its terms; and they will be decisive on this point, if by the agreement the terms of the new one are to be the same with those of the old. The question often occurs, however, What can a partner do, who wishes

(*a*) Howe *v.* Thayer, 17 Pick. 91. But in Rogers *v.* Reed, 18 Me. 257, the court held, that evidence that persons were partners ten months before the note in suit was signed, was not evidence that they were so at that time.

to terminate such a partnership before the agreed period arrives? And we have already seen that there is much difficulty in determining how far the parties are bound by such agreement in practice. No doubt exists that equity may decree dissolution for cause, whatever be the agreement, or may refuse such a degree, and even enjoin a continuance of the partnership. And we shall presently see that certain acts, which would seem to be always in the power of a partner, as a transfer of his interest, or his insolvency, or retirement in any way, generally dissolve the partnership. And the question has arisen, whether equity will ever compel parties to remain in this relation, after it has become certain that there is no longer mutual confidence or regard or desire for continuing the connection. This question we have already touched upon; (*b*) and it is perhaps impossible to give even a general rule on the subject, unless we venture to state this to be one: That equity will not in such case decree a continuance of the partnership because the agreed period has not expired, unless, in the first place, a decided wrong and injury would be inflicted by the present dissolution; and, secondly, it is practicable for the court to insist upon such a continuance as will in fact prevent the threatened mischief, without doing other harm. (*c*)

§ 281. **Time of Dissolution Conditional.**—The provision in the articles on this subject may not be so simple as above suggested. It may be that the partnership shall continue until certain circumstances occur, or until one partner or the other does certain things. In such a case, there is no dissolution by the articles until the circumstances occur, or the act be done. Difficult questions of fact may arise under such a clause; but, so far as a question of law can come from it, it must be governed by the ordinary principles of contracts on a condition. (*d*)

(*b*) See *ante*, §§ 163, 207. And see *post*, 309, note (*c*).

(*c*) Chavany *v.* Van Sommer, cited 1 Swanst. 512, note, and 3 Wooddes. Lect. 416, note; Barring *v.* Dix, 1 Cox, 213; Smith *v.* Jeyes, 4 Beav. 503; Harrison *v.* Tennant, 21 Beav. 482; *In re* Electric Telegraph Co. of Ireland, 22 Beav. 471; Waters *v.* Taylor, 2 Ves. & B. 229; Skinner *v.* Dayton, 19 Johns. 538; Peacock *v.* Peacock, 16 Ves. 56; Crawshay *v.* Maule, 1 Swanst. 495; Pearpoint *v.* Graham, 4 Wash. C. C. 234; Cape Sable Co.'s Case, 3 Bland, 674; Monroe *v.* Conner, 15 Me. 180; Howell *v.* Harvey, 5 Ark. 281; Beaver *v.* Lewis, 14 Ark. 138; Mann *v.* Connell, 1 Whart. 388; Whitton *v.* Smith, 1 Freem. Ch. (Miss.) 231; Blake *v.* Dorgan, 1 Greene (Iowa), 540; Garretson *v.* Weaver, 3 Edw. Ch. 385; Kennedy *v.* Kennedy, 3 Dana, 239; Gowan *v.* Jeffries, 2 Ashm. 296. As to seasonable time, see Wheeler *v.* Van Wart, 2 Jur. 252; Reade *v.* Bentley, 3 Kay & J. 271, 4 Kay & J. 65; Potter *v.* Gray, 1 R. I. 430. As to the grounds on which equity will decree a dissolution, see Meaher *v.* Cox, 37 Ala. 201.

(*d*) See 2 *Pars. Contr.* (5th ed) 525–527.

§ 282. **Time of Dissolution Implied.**—The articles may omit all reference to the termination of the partnership; and sometimes the agreements as to the partnership are only oral, (*e*) and sometimes the partners expressly agree simply to be partners, leaving all the rest to their mutual but silent understanding, or to time and the operation of law. (*f*) In these cases, it may be a question whether the facts and circumstances do not imply or raise a presumption of law that there was some agreement for a definite term. This question has been not unfrequently mooted, and sometimes it seems to have been decided on doubtful principles. We certainly should not deny that there may be such inferences or implications; but they should not readily be admitted.[1]

If, for example, a partnership, needing land or a store for its business, hired one, paying the rent from partnership funds, and using it for partnership purposes, so as to leave no doubt that it is partnership property, could it be said that the lease implies an agreement that the partnership shall continue until the lease expires? We think not; and the best authorities lead to this conclusion. (*g*) As a matter of actual probability, such a lease is very slight evidence of any such intention. They may have taken it for many years, because they could not get it otherwise, and were willing to take the risk of disposing of it when they should dissolve; or they may have taken it in order to be sure, at all events, of the premises as long as they might want them. Other suppositions might be made: so many, indeed, that we think the lease while standing alone would not amount, even if wholly unexplained, to *primâ facie* evidence, either in fact or in law, of any understanding that the partnership should last as long as the lease run.

So, too, if the partnership entered into long and continuing contracts of business, or engaged in some transaction which could not be closed for a considerable period without great loss, we should say, that nothing of this kind would be very strong evidence of a

(*e*) *Ante*, § 6.

(*f*) *Ante*, § 159.

(*g*) Crawshay *v.* Maule, 1 Swanst. 495; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307; Alcock *v.* Taylor, Tamlyn, 506; Jefferys *v.* Smith, 1 Jac. & W. 301. See Marshall *v.* Marshall, cited 2 Bell Comm. 641, n. 3, and 633, n. 1.

[1] Where it was provided in the articles of partnership between A & B, that if A survived he might get all the assets upon payment of a certain sum to B's representatives, and if B survived he should have all the assets without payment, it was held not to be a partnership at will, but for the term of their joint lives. Dobbins *v.* Tatem, (N. J. Eq.) 25 Atl. 544. For an agreement in which the circumstances were deemed (with perhaps too little consideration) sufficient to show that the partnership was not at will, see Ball *v.* Britton, 58 Tex. 57.

definite understanding or agreement for continuance. (*h*) There may be many ways of transferring or cancelling such contracts, or bringing such transactions to a close, or even of continuing them after the partnership has closed. We should admit that all circumstances of this kind might be admissible and useful evidence in connection with the general course of the business, the usage relating to it, and all those facts which, looking to the future, imply an intention in regard to it. But, so far as a general principle can be given for this class of questions, it must, we think, be this: That equity would not decide on such grounds that the partners had mutually agreed to continue as partners for a certain period; unless no other theory so well satisfied and explained all the facts of the case, and a permission to either partner to dissolve at pleasure would work great mischief. Then, perhaps, equity might prefer to decide that the parties had agreed to remain together, and therefore should not part, rather than to say that one of them should not exercise his right to dissolve the firm, because he would thereby inflict an injury. (*i*) But if one of several partners agrees with a stranger for a sub-partnership, it is not to be implied, merely from the absence of any agreement to the contrary, that the duration of the sub-partnership is to be coextensive with the original partnership. (*j*)

§ 283. **Partnership for Temporary Purpose.** — Partnerships are sometimes formed for a single adventure or enterprise. Then, they terminate when that enterprise is brought to a close; (*k*) for the articles of agreement which limit the partnership to that adventure imply that it ceases when that ceases; but, for the purpose of winding up those affairs, it continues until all past transactions are closed. (*l*) But such a partnership may continue, by express agreement, or by the partners going on to act as partners in other transactions; and this would not be considered as a new

(*h*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307. But see Potter *v.* Gray, 1 R. I. 430. The mere fact that a firm has incurred debts, and charged its assets for their payment, is no evidence of an agreement that the firm shall continue until its debts are paid. See King *v* The Accumulative Assurance Co., 3 C. B. N. S. 151.

(*i*) In Wheeler *v.* Van Wart, 2 Jur. 252, the deed of settlement constituting a company contained no clause limiting the duration of the partnership; but it provided that certain persons should be appointed directors until July, 1838, or until an act of Parliament should be had. The Vice-Chancellor said: "It is my opinion that they could not dissolve until July, 1838; and, if so, then, as in an ordinary partnership, they could not do it without notice." This point is not mentioned in the report of the case in 9 Sim. 193. See Reade *v.* Bentley, 3 Kay & J. 271, 4 Kay & J. 65; Potter *v.* Gray, 1 R. I. 430.

(*j*) Frost *v.* Moulton, 21 Beav. 596.

(*k*) Pothier, Contrat de Soc. No. 140-143.

(*l*) Petrikin *v.* Collier, 1 Barr, 247.

and distinct partnership, but as a continuation of the original one, and a continuation of the original terms, unless new parties came in, or it could be shown, or inferred from circumstances, that the terms were varied.

So, too, if the partnership were formed for dealing with a subject-matter certain to expire at a certain time, or even to expire at any time, it must be understood as providing that the partnership shall then expire. As, if for traffic with a certain patent or copyright, which had a definite number of years to run. We apprehend, that, if such patent or copyright were renewed under the general law, the partnership would still continue. But, if it were renewed only by special statute or grant, a continuance of the partnership would require a new agreement. (*m*)

§ 284. **Dissolution by Will of all the Partners.** — It is obvious and certain that the contract of partnership is rescindable by all who are parties to it, at their own pleasure. (*n*)[1] But a majority of the partners may not exclude one of the partners from the firm without sufficient cause. It has been held not a sufficient cause, that he paid into the capital a part only of what he agreed to contribute, if that part had been accepted, and used in the business of the firm. (*nn*)

A technical distinction, still mentioned in our text-books, that, if the contract of copartnership is under seal, it cannot be revoked and cancelled excepting under seal, has never had any force in equity; and we do not suppose that it would now have any practical effect in law. (*o*)

(*m*) See Wheeler *v.* Van Wart, 9 Sim. 193, 2 Jur. 252; Reade *v.* Bentley, 4 Kay & J. 656, 3 Kay & J. 271.

(*n*) See Master *v.* Kirton, 3 Ves. 274.

(*nn*) Hartman *v.* Woehr, 3 Green (N. J.), 383.

(*o*) This point was raised in Waithman *v.* Miles, 1 Stark. 181. The partnership deed was under seal. To prove a dissolution, a written notice was put in, signed by all the parties, which stated that they had dissolved the partnership. Lord Ellenborough said it might be very deserving of attention, whether a partnership created by deed could be dissolved by anything short of a deed; but here, as against the party, who signed the notice, the partnership must be taken to have been dissolved by competent means. Same

[1] *Dissolution by Mutual Consent.* — By unanimous consent of the partners, a partnership may be dissolved at any time, though the term has not expired. Bank of Montreal *v.* Page, 98 Ill. 109. So where all the partners join in an assignment of the assets for the benefit of creditors, it operates as a dissolution. Wells *v.* Ellis, 68 Cal. 243, 9 Pac. 80; but see Williston *v.* Camp, 9 Mont. 88, 22 Pac. 501. So the firm is dissolved by a refusal of all the partners to proceed with the business. Ligare *v.* Peacock, 109 Ill. 94. And the same is true where the partners wind up the business and divide all the assets among themselves. Richardson *v.* Gregory, 126 Ill. 166, 18 N. E. 777; Kennedy *v.* Porter, 109 N. Y. 526, 17 N. E. 426.

Not only would any express renunciation have this effect, but a general consent of the termination of the partnership would be inferred from conduct or circumstances not otherwise explicable; as, by a tacit renunciation and stopping of business, settlement of the debts and accounts, converting of the property into money, or division of it among the partners, sale of the good-will, or the like. (*p*)

§ 285. **Dissolution by Incorporation.** — It has been questioned whether the incorporation of the partners, for a similar business, would amount to a dissolution by consent. This has not unfrequently occurred in this country, where successful manufacturers or mechanics have found their business so enlarged that it was more convenient to transact it under the forms of a corporation. We should say that this fact alone would not necessarily be the dissolution of the partnership. But it never would stand alone. The corporation would always have some defined relation to the former partnership. Either it would be a substitute, taking all its business and all its property, leaving it nothing to hold, nothing to do, and nothing to be; in which case it would be clear that the partnership had died out; or else some portion of the business and the stock would be left for the firm, and some use made of it; and then it would remain for these purposes. (*q*)[1]

§ 286. **Effect of Dissolution on the Interests or Rights of Partners.** — Some general results follow a dissolution of partnership, or some general principles apply to dissolution, which are especially pertinent to dissolution by articles or by consent, and we will present them in a general form now; reserving the modifications

case not reported so fully, 4 Camp. 373. In Hutchinson *v.* Whitfield, Hayes, 78, it was provided that the partnership should be dissolved only by deed. It was held that an award under a submission, both under seal, dissolving the partnership, was valid. The action of covenant lies for a wrongful dissolution. Addams *v.* Tutton, 39 Pa. 447.

(*p*) For cases bearing on such questions, see Heath *v.* Sansom, 4 B. & Ad. 175; Jefferys *v.* Smith, 3 Russ. 158; Johnson *v.* Evans, 7 M. & G. 240; Habershon *v.* Blurton, 1 De Gex & S. 121; Aspinall *v.* The London & N. W. R. Co., 11 Hare, 325; Perens *v.* Johnson, 3 Sm. & G. 419.

(*q*) See Goddard *v.* Pratt, 16 Pick. 412; The Cape Sable Company's Case, 3 Bland, 674. There is no doubt that after the incorporation the members of the firm are liable for all debts previously incurred. Haslett *v.* Wotherspoon, 2 Rich. Eq. 395. But if the new corporation assumes all debts and liabilities of the old firm, and the creditors assent thereto, they cannot on the failure of the corporation hold the former members of the firm. Whitwell *v.* Warner, 20 Vt. 425.

[1] Where it was provided in the articles that the firm should be incorporated as soon as might be, the partnership was held to be dissolved as soon as the corporation was formed. Hennessy *v.* Griggs, 1 N. Dak. 52, 44 N. W. 1010.

in them caused by particular methods of dissolution, until we specially consider those methods.

In the first place, a mere dissolution has no effect whatever on the property of the partners, or their interest in the joint stock or joint rights, or their power over old or existing debts due to them or due from them; excepting always that they have all entirely lost the power of acting for each other, or binding each other, any further than all joint debtors or joint creditors may do. Thus, if we suppose a dissolution by articles or consent, and no special agreement as to the powers or acts of the several partners, each one has a perfect right to require, and through equity compel, a final settlement and adjustment of all questions and all property; (*r*) and each one has the same power as to this, and all the details connected with it, as any other. So, too, each partner has as much right to any particular thing or things as any other; and all the others have as much right as he has. (*s*)[1]

As all are liable for the debts, so any one may make a payment of any or all the debts, and charge such payment to the partnership, without any express authority for this. (*t*) Even if he uses property to pay the debt in a way that is fraudulent or injurious to his former partners, and must, therefore, respond to them in account or as damages for the act; the creditor thus paid, provided he do not participate in the wrong, will hold his payment, even if he were aware of the dissolution. (*u*)

(*r*) *Ante*, § 206.

(*s*) Mumford *v.* McKay, 8 Wend. 440. See Downs *v.* Jackson, 33 Ill. 464, on the relative mutual liability of each partner for the partnership debts. And see Robbins *v.* Fuller, 24 N. Y. 570; Ward *v.* Tyler, 52 Pa. 393. See, on the relations and liabilities of partners after dissolution, Chapman *v.* Thomas, 4 Keyes, 216.

(*t*) Lyon *v.* Haines, 5 M. & G. 541; Smith *v.* Winter, 4 M. & W. 461; Butchart *v.* Dresser, 10 Hare, 453, 4 De G., M. & G. 542. In this last case, it was said: "Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership for partnership purposes as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this court for a receiver in every case, although the partners did not differ on any one item in the account." And see Darling *v.* March, 22 Me. 184; Roots *v.* Welford, 4 Munf. 215; Woodford *v.* Downer, 13 Vt. 522; Union Bank *v.* Hall, 1 Harper, 245; Wood *v.* Braddick, 1 Taunt. 104.

(*u*) See Butchart *v.* Dresser, 4 Russ. 430; Lewis *v.* Reilly, 1 Q. B. 349.

[1] If after dissolution one partner makes exclusive use of the assets, he must account to the other partners for the value of the use. Ligare *v.* Peacock, 109 Ill. 94. So if he converts the assets to his own use he must account for their value. King *v.* White, 63 Vt. 158, 21 Atl. 535. For the rule in case of dissolution by death, see *post*, § 346, note.

§ 287. **Effect of Dissolution on Power over Firm Debts.** — As to the debts due to the partnership, any one partner may claim and receive them for the partnership; and his receipt would be binding on the partnership, in favor of an innocent debtor. (*v*) We should apply the same principle to any method of payment. Thus, if the partner compromised the debt, allowing an enormous discount for immediate payment, with a design to abscond with the money, or otherwise defraud the other partners, we should say, as matter of law, that an entirely innocent debtor would still be protected, although he knew of the dissolution. (*w*) But we should also say, that, as matter of fact, any such circumstances would strongly aid the proof of dishonesty, or even raise a presumption of it. For it would certainly be a general probability, that a debtor of a partnership which he knew to be dissolved, if he found one of the partners so anxious to settle the account or anticipate payment as to consent to great sacrifices, would infer that mischief might be intended, and at least be sufficiently warned to put him upon inquiry as to the honesty and validity of the proposed transaction. But, we repeat, we should consider this a question only of fact; for the rule of law must be, that a dissolution without especial agreement leaves all the partners on equal ground, and gives to each an equal power of settlement. (*x*)

Therefore it is that such a dissolution is rare. Far more frequently provision is made, either in the original articles or in an agreement at the time of dissolution, as to the manner of settlement; that is, who shall collect and pay the debts, adjust and settle the accounts, and (to use the common phrase) wind up the concern. And such an agreement certainly affects all the partners and all third parties who have notice or knowledge of it.

§ 288. **Winding up the Concern.** — The general rule we take to be this: The concerns of the partnership must be wound up in some way and by some persons. The partners may provide for this at their own pleasure. If they do not provide for it, the law provides for it in the only possible way; and that is by continu-

(*v*) See cases cited, *ante*, note (*t*). And see Elliott *v.* Brown, 3 Swanst. 489, n.; Hawkins *v.* Hawkins, 4 Jur. N. S. 1044; Benham *v.* Gray, 5 C. B. 138; Waithman *v.* Miles, 4 Camp. 373; Colnaghi *v.* Bluck, 8 C. & P. 464, as to other rights of partners after dissolution.

(*w*) Union Bank *v.* Hall, 1 Harper, 245. In New York, it is enacted by statute passed April 18, 1838, ch. 257, that after the dissolution of a firm, one or more of the partners may make a compromise with any creditor of the firm, which compromise shall only operate to discharge the debtor making the same. But such compromise shall not operate to prevent the other copartners from calling on the partner making the same for his ratable portion of such debt.

(*x*) See cases in previous notes.

ing the partnership, with its incidents of interest, power, and obligation, for the purpose of thus winding up, and therefore as far as is necessary for thus winding up, and no further. (*y*) And this power of a former partner has been held to pass to his administrator at his death. (*yy*)

It follows that every partner has full authority to do anything the want of which would prevent this winding up, or leave it incomplete; and that he can do nothing which is not indispensable for this purpose. We say indispensable, in exclusion of what is merely convenient, or even desirable and expedient, unless it can be considered necessary for the proper settlement of the affairs of the firm. And even a settlement by a partner after dissolution, in fraud of the firm, would be valid in favor of a third party who was wholly innocent. (*yyy*)

§ 289. **Settling or Liquidating Partner.** — If the partners agree, as they generally do, that one or more of them shall wind up the business, while the others have nothing to do with it, this arrangement *confines* the power to those thus designated; but does not *enlarge* this power in them, although it takes it away from the others.[1] It seems, however, to be well settled, that an authority given to one partner "to close all business transactions of the late firm;" (*z*) "to settle up the business of the firm;" (*a*) "to settle

(*y*) *Ex parte* Williams, 11 Ves. 5; Peacock *v.* Peacock, 16 Ves. 57; Crawshay *v.* Collins, 15 Ves. 227, 2 Russ. 342; Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, 1 Swanst. 507; Butchart *v.* Dresser, 4 De G., M. & G. 542; Payne *v.* Hornby, 25 Beav. 280; Chappell *v.* Allen, 38 Miss. 213; Thursby *v.* Lidgerwood, 69 N. Y. 198.

(*yy*) Mutual Institution *v.* Euslen, 37 Mo. 453.

(*yyy*) Thrall *v.* Seward, 37 Vt. 573.

(*z*) Palmer *v.* Dodge, 4 Ohio St. 21.

(*a*) Parker *v.* Cousins, 2 Gratt. 372; Long *v.* Story, 10 Mo. 636; Martin *v.* Walton, 1 McCord, 16; Parker *v.* Macomber, 18 Pick. 505; Fellows *v.* Wyman, 33 N. H. 351.

[1] *Liquidating Partners.* — Upon dissolution it is competent for the partners to agree on one partner as special agent for winding up the affairs; one who thereafter deals with another partner in liquidation matters with notice of this appointment can get no benefit thereby. Hilton *v.* Vanderbilt, 82 N. Y. 591. No express agreement upon one partner as liquidating partner need be proved; one may be shown to be the liquidating partner by evidence of circumstances, as that he exercises the functions of such office with the tacit consent of the other partners. Fulton *v.* Central Bank, 92 Pa. 112; Siegfried *v.* Ludwig, 102 Pa. 547; Campbell *v.* Floyd (Pa.), 25 Atl. 1033. When neither partner is created a liquidating partner, either may so act. Hawn *v.* Land & Water Co., 74 Cal. 418, 16 Pac. 196.

In some cases of dissolution, one partner has the right to liquidate without special agreement or appointment. Thus upon dissolution by bankruptcy the sole solvent partner has a right to take the assets and settle the affairs of the partnership. Vetterlein *v.* Barnes, 6 F. R. 693; King *v.* Leighton, 100 N. Y. 386, 3 N. E. 594. It is, however, a right which he may waive, as by permitting the assignee of the bankrupt partner to administer the assets. Vetterlein *v.* Barnes, 6 F. R. 693.

all demands in favor of or against the firm;" (*b*) "to settle business of the firm, and for that purpose to use their name;" (*c*) "to settle business of the firm and sign its name for that purpose;" (*d*) "to use the name of the firm in liquidation, only of past business," (*e*) — confers no more power than the partner would have by the general principles of the law of partnership. In one case, however, the court were of the opinion that the authority given to use the partnership name conferred a greater power than would have otherwise existed, and held that it was for the jury to find, from the course of trade, and the usage and custom of merchants, as well as from the notice itself, whether this power extended to the renewal of a note which had been discounted at a bank previous to the dissolution. (*f*) When one partner takes all the assets, for the purpose of settlement, equity may require him to indemnify the other partners against the liabilities of the firm. (*ff*) If a partner, under such an authority, receives a note, in payment of a debt due to the firm, payable to bearer, it seems that the legal title to such note will vest in such partner alone; and, therefore, he will be able to give a good title to it by delivery. (*g*)

§ 290. **Power of Settling Partner to Contract.** — The questions which refer to this rule have arisen principally where any former partner, and especially where a partner authorized by the rest to settle the concern, has issued new paper, or indeed entered into any new contract. This may be not only honest, but in the highest degree advantageous, to all concerned. Thus, a creditor may be willing to renew a note or bill, or take a note or bill for a former purchase on a credit which has expired; and, unless he can have this note or bill in the name of the firm, he insists upon all his money, which can neither be refused nor paid without disaster. It is an unquestioned principle of law, that after a dissolution the authority of a former partner to bind the others is gone,

(*b*) Lockwood *v.* Comstock, 4 McLean, 383.

(*c*) National Bank *v.* Norton, 1 Hill, 572.

(*d*) Hamilton *v.* Seaman, 1 Ind. 185.

(*e*) Martin *v.* Kirk, 2 Humph. 529.

(*f*) Myers *v.* Huggins, 1 Strobh. 473.

(*ff*) Cook *v.* Jenkins, 35 Ga. 113.

(*g*) See the language of Shaw, C. J., in Parker *v.* Macomber, 18 Pick. 505, where the individual note of a partner, made after the dissolution of the partnership, was transferred by the holder to the firm, by an indorsement in blank, in payment of a debt, it was held, that such note, being payable to bearer, might be legally transferred to a third person by another partner, who was authorized to settle the concerns of the partnership. On a settlement of partnership affairs, if it is agreed that one of the partners shall collect a note and accounts, for the benefit of both, it will be presumed that the money, as fast as received, shall be divided between the parties. Metcalf *v* Fouts, 27 Ill. 110.

except as to the settlement of the estate of the old partnership; and it is usually stated that he has no power to make any new contracts.[1] It is obvious, however, that a strict construction of this rule might prevent the partner whose duty it is to settle up the estate from accomplishing this object in the most judicious manner. So far as the question is still an open one, we should consider the true rule to be, that no contract can be made by one partner, after dissolution, by which the others will be bound, unless such contract is necessary for settling up the business of the concern in the most judicious manner.

§ 291. **Other Powers of Settling Partner.** — The duty of settling partners is similar in many respects to that of trustees and agents; (*h*) and they should, in settling up the affairs of the old firm, have all the rights which agents usually have by the usages of the business in which the old firm was engaged. In the language of the Supreme Court of Maine, "The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created." (*i*) Thus, in a case where a bill of exchange was drawn in blank by one partner, to the order of the firm, and indorsed before the dissolution of the firm, it was held, that it might after that event be filled up and negotiated. (*j*) And, after dissolution, one partner may waive demand and notice, this being considered as merely a modification of an existing liability; (*k*) he may also, it has been held, lawfully assign to a creditor of the firm a demand due to the partnership; (*l*) or acknowledge in the partnership name, after dissolution, a balance due from the partnership. (*m*) If a note is signed by a firm payable to the order of one of its members, this person may indorse the note after the dissolution of the firm, so as to bind it. (*n*)

(*h*) Washburn *v.* Goodman, 17 Pick. 519. See Wilson *v.* Stilwell, 14 Ohio, 464; Parker *v.* Phillips, 2 Cush. 175. See also Caldwell *v.* Stileman, 1 Rawle, 212; Beak *v.* Beak, 3 Swanst. 627.

(*i*) Darling *v.* March, 22 Me. 184. But the power to give a note, in renewal of one given before dissolution, is denied in Lumberman's Bank *v.* Pratt, 51 Me. 563. The same rule was held where a note was given for a debt created before the dissolution. Cunningham *v.* Bragg, 37 Ala. 436. See also Gannett *v.* Cunningham, 34 Me. 56.

(*j*) Usher *v.* Dauncey, 4 Camp. 97; Lewis *v.* Reilly, 1 Q. B. 349. See Myers *v.* Standart, 11 Ohio St. 29.

(*k*) Darling *v.* March, 22 Me. 184.

(*l*) Milliken *v.* Loring, 37 Me. 408.

(*m*) Ide *v.* Ingraham, 5 Gray, 106.

(*n*) Temple *v.* Seaver, 11 Cush. 314.

[1] A continuing partner can make no new contract which shall bind the firm. *Ante* § 131 *et seq.*; Goodspeed *v.* Wiard Plow Co., 45 Mich. 322; Gardner *v.* Conn, 34 Oh. St. 187; Bank *v.* Green, 40 Oh. St. 431; Lee *v.* Stowe, 57 Tex. 444.

In Pennsylvania, the courts have fully adopted the principle that as to past transactions the partnership continues until they are settled. Thus, it is held that after dissolution a partner may borrow money to pay partnership debts, (*o*) and may renew the notes of the firm; (*p*) or give notes in the firm name, in payment of firm debts. (*q*)

§ 292. **Power to deal with Negotiable Paper.** — There are, however, other authorities, which construe the rule that a partner cannot make a new contract after dissolution very strictly, and hold that the power of a surviving partner not only does not extend to the giving of a note, (*r*) or accepting of a bill, (*s*) in the firm name, after dissolution, for a pre-existing debt of the firm, even though it be antedated so as to bear date before the dissolution, (*t*) but also that he cannot renew bills or notes given by the partnership before dissolution, so as to bind his former copartners, (*u*) or indorse notes given to the firm before dissolution, so as to vest the title in the indorsee. (*v*)

Nor, it has been held, can he indorse notes belonging to the firm at the time of the dissolution, so as either to render the other partners liable on his indorsement, or to pass a valid title to the notes. (*w*) It has even been doubted whether a note in-

(*o*) Estate of Davis & Desauque, 5 Whart. 530.

(*p*) Id.; Brown *v.* Clark, 14 Pa. 469.

(*q*) Robinson *v.* Taylor, 4 Barr, 242.

(*r*) Lockwood *v.* Comstock, 3 McLean, 383; Bank of Port Gibson *v.* Baugh, 9 Sm. & M. 290; Hamilton *v.* Seaman, 1 Ind. 185; Perrin *v.* Keene, 19 Me. 355; Lusk *v.* Smith, 8 Barb. 570. [See *ante*, § 131.] In Mitchell *v.* Ostrom, 2 Hill, 520, the note in suit was signed, "Late firm M., J., E., & Co." The settlement of a book account, by a note *on time*, given in the name of the firm, by the remaining partner authorized to liquidate, does not bind the retiring partners. They stand to the remaining partner in the relation of sureties; and the latter cannot bind them to any new contracts, imposing additional burdens. Smith *v.* Sheldon, 35 Mich. 42.

(*s*) Tombeckbee Bank *v.* Dumell, 5 Mason, 56.

(*t*) Wrightson *v.* Pullan, 1 Stark. 375; Lansing *v.* Gaine, 2 Johns. 300.

(*u*) Palmer *v.* Dodge, 4 Ohio St. 21; National Bank *v.* Norton, 1 Hill, 572; Parker *v.* Cousins, 2 Gratt. 372; Martin *v.* Kirk, 2 Humph. 529; Long *v.* Story, 10 Mo. 636; Stone *v.* Chamberlin, 20 Ga. 259. In Bank of South Carolina *v.* Humphreys, 1 McCord, 388, the firm during the continuance of the partnership, had written a letter to the holder of a note against them, requesting permission to renew it, until the expiration of a certain time, during which time a renewal was given by one partner, but subsequent to the dissolution. It was held that the firm was not bound. See Van Valkenburgh *v.* Bradley, 2 Iowa, 108, overruling Kemp *v.* Coffin, 3 Greene (Ia.), 190. And see Richardson *v.* Moies, 31 Mo. 430.

(*v*) Sanford *v.* Mickles, 4 Johns. 224; Fellows *v.* Wyman, 33 N. H. 351. See also Geortner *v.* Trustees, &c., 2 Barb. 625; White *v.* Tudor, 24 Tex. 639; Cavitt *v.* James, 39 Tex. 189. See § 291, note (*n*).

(*w*) Abel *v.* Sutton, 4 Esp. 108; Sanford *v.* Mickles, 4 Johns. 224; Parker *v.* Macomber, 18 Pick. 505; Humphries *v.* Chastain, 5 Ga. 166. See Fowle *v.* Harrington, 1 Cush. 146.

dorsed before dissolution, but negotiated afterwards, will bind the firm; (*x*) but, if negotiated in good faith for the purposes for which it was indorsed, we are inclined to think it would, although the contrary doctrine has been held. (*y*)

§ 293. **Settling Partner acting with Express Authority.** — One partner, after dissolution, may, of course, bind his copartner by any of the above acts, if he have an express authority for that purpose. And such authority may be given by parol, although the terms upon which the partnership was dissolved should be in writing. Thus, where a retired partner stated that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name, it was held that the jury were justified in finding that the continuing partner had authority to indorse promissory notes so left in his hands, in the partnership name. (*z*) So an authority by parol to continuing partners to *sell* a negotiable note made to the firm before dissolution, will authorize an *indorsement* of such note, "without recourse," in the name of the firm. (*a*) This authority may also be given by implication; as where one partner receives a note as his portion of the property of the firm. In such case, he may indorse it without recourse; (*b*) but without authority, either express or implied, it has been held that such power does not exist. (*c*) So it has been said, that the settling partner's transfer of a bond would be good, under his general authority. (*d*)

§ 294. **Power to do Acts Necessary for Winding up.** — And it is certain, as has been already said, that for all ordinary transactions, the power of each partner must be equal to that of any other partner, unless the power of acting in behalf of the firm is confined by agreement to one; and then this power of this one must be complete for the purpose of winding up, unless expressly limited. Therefore, the settling partner may pay and receive payment, (*e*) may sell goods consigned to the firm before dissolu-

(*x*) Per Lord Kenyon, in Abel *v.* Sutton, 4 Esp. 108.

(*y*) In Glasscock *v.* Smith, 25 Ala. 474. The question was raised, but not decided, in Mechanics' Bank *v.* Hildreth, 9 Cush. 359.

(*z*) Smith *v.* Winter, 4 M. & W. 454. In Burton *v.* Issitt, 5 B. & Ald. 267, by a deed of dissolution of partnership, a power was reserved to the remaining partners to use the name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners before the dissolution, it was held, that the remaining partners had authority under that power to give to the defendant a note for the payment of the sixpences, under the Lords' Act, on behalf of themselves and the retiring partner.

(*a*) Yale *v.* Eames, 1 Met. 486.

(*b*) Waite *v.* Foster, 33 Me. 424.

(*c*) Fellows *v.* Wyman, 33 N. H. 351.

(*d*) Morse *v.* Bellows, 6 N. H. 568.

(*e*) Butchart *v.* Dresser, 10 Hare, 453,

tion, (*f*) and may compromise debts in any way which does not indicate fraud. (*g*) [1] So, too, he may undoubtedly exchange goods, but always for the purpose of winding up the old concern. He has power to draw a bill upon a debtor of the firm, and, on its being accepted, to sue him in the firm name; (*h*) to release a debt due to the firm; (*i*) to pledge shares of stock which the firm had contracted to buy, but had not paid for, to raise the money to pay for the shares; (*j*) to collect, compound, and release debts of the firm. (*k*) But, anything done by him, however innocent and proper in itself, would not be within the scope of his authority, if it was done for the purpose of continuing the business of the firm, or opening it anew, instead of winding it up. (*l*)

It may be doubted, too, whether he can, without especial authority, buy goods so as to bind the other partners for the purchase. It is not uncommon, in practice, for a settling partner to make small purchases, in order to complete an assortment of goods on hand, and promote the sale thereof. If he does this with cash, in good faith, the seller certainly holds the money, and we should have no doubt that he might credit himself with such payments in his account. But, if he buys on credit, we do not think that the other partners would be held, unless they distinctly authorize the purchase. (*m*)

§ 295. **Power of Court of Equity over Settlement.** — All the partners, and each partner, have the right of requiring that the settlement should be made with reasonable promptitude, and with entire respect for the rights and interests of each one. And, of course, no partner can have any rights inconsistent with these rights of his copartners. (*n*) And if anything is done which should not be done, or left undone which should be done, a court

4 De G. M. & G. 542. See also Parker *v.* Phillips, 2 Cush. 175, 178; Washburn *v.* Goodman, 17 Pick. 519, 536; Fereira *v.* Sayres, 5 W. & S. 210; Beak *v.* Beak, 3 Swanst. 627.

(*f*) Herberton *v.* Jepherson, 10 Barr, 124.

(*g*) Bass *v.* Taylor, 34 Miss. 342.

(*h*) King *v.* Smith, 4 C. & P. 108.

(*i*) Napier *v.* McLeod, 9 Wend. 120.

(*j*) Butchart *v.* Dresser, 10 Hare, 453, 4 De G. M. & G. 542. [But one partner after dissolution cannot usually pledge the assets even to pay the debts. Roots *v.* Mason City Salt Co., 27 W. Va. 483.]

(*k*) Huntington *v.* Potter, 32 Barb. 300.

(*l*) Wilson *v.* Greenwood, 1 Swanst. 481; Crawshay *v.* Maule, 1 Swanst. 507; *Ex parte* Williams, 11 Ves. 3.

(*m*) See Minnit *v.* Whinnery, 5 Bro. P. C. 489, 2 Bro. P. C. (Dublin ed.) 323, 16 Vin. Abr. 244; Vice *v.* Fleming, 1 Younge & J. 227; *Ex parte* Harris, 1 Madd. 583.

(*n*) See Lees *v.* Laforest, 14 Beav. 250; Clegg *v.* Fishwick, 1 Mc. & G. 294; Perens *v.* Johnson, 3 Sm. & G. 419; Clements *v.* Hall, 2 De G. & J. 173.

[1] Buxton *v.* Edwards, 134 Mass. 567; Conrad *v.* Buck, 21 W. Va. 396.

of equity will interfere. There is, perhaps, no class of questions or of cases in which equity so readily or so usefully exerts its power as in those which arise under dissolution of partnership. The guiding principle in its action is, to preserve equally the rights of all parties. (*o*) Hence, no partner can make any use of the property for his own particular benefit; but he will be held chargeable for all the profits and advantages which may accrue from such use, either as trustee, or in some other adequate way. (*p*) And, as a general rule, each partner has an equal right to the possession of the partnership property. If the firm is dissolved, and the partners cannot agree as to the division of it, a court of equity will appoint a receiver to collect and apply the effects. (*q*) Nor can any partner claim to himself any especial commission or payment for his services in settling, unless there be an agreement to that effect; the reason which forbids this after dissolution being the same which forbids such claim for services in the ordinary partnership business; namely, the entire equality of the partners, unless they agree upon some inequality. (*r*) So too, all compositions or compromises of debts, all settlements, and all the transactions which follow dissolution, must be for the common and equal benefit of all the partners. (*s*)

§ 296. **Effect of Dissolution upon Third Parties.** — No dissolution of any kind affects the rights of third parties, who have had dealings with the partnership, without their consent. This is a universal rule, without any exception whatever. (*t*) Undoubtedly,

(*o*) Bennett's Case, 18 Beav. 339, 5 De G. M. & G. 284; Benson *v.* Heathorn, 1 Younge & C. 326; York & North Midland R. Co. *v.* Hudson, 16 Beav. 485; Maxwell *v.* The Port Tennant Co., 24 Beav. 495; Richardson *v.* Larpent, 2 Younge & C. 507; Harris *v.* The North Devon R. Co., 20 Beav. 384.

(*p*) Kelley *v.* Greenleaf, 3 Story C. C. 93, 101; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Pothier, Contr. de Soc. ch. 8, § 4, art. 150. See also Leach *v.* Leach, 18 Pick. 68; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, 70.

(*q*) Terrell *v.* Goddard, 18 Ga. 664. See Stevens *v.* Yeatman, 19 Md. 480.

(*r*) Caldwell *v.* Lieber, 7 Paige, 483; Thornton *v.* Proctor, 1 Anst. 94; Franklin *v.* Robinson, 1 Johns. Ch. 157, 165; Bradford *v.* Kimberly, 3 Johns. Ch. 431; Burden *v.* Burden, 1 Ves. & R. 170; Lee *v.* Lashbrooke, 8 Dana, 219; Paine *v.* Thatcher, 25 Wend. 450; Anderson *v.* Taylor, 3 Ired. 420; Reybold *v.* Dodd, 1 Harr. (Del.) 401; Newland *v.* Tate, 3 Ired. Eq. 232; Phillips *v.* Turner, 2 Dev. & B. Eq. 123; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Washburn *v.* Goodman, 17 Pick. 519; Hite *v.* Hite, 1 B. Mon. 179. But see Bradley *v.* Chamberlin, 16 Vt. 613; Wilby *v.* Phinney, 15 Mass. 120.

(*s*) See Porter *v.* Wheeler, 37 Vt. 281; Beak *v.* Beak, 2 Swanst. 627; Page *v.* McCrea, 1 Wend. 167; Bracket *v.* Winslow, 17 Mass. 153; Hammatt *v.* Wyman, 9 Mass. 139; Stevens *v.* Morse, 7 Me. 36.

(*t*) Story on Part. § 334; Ault *v.* Goodrich, 4 Russ. 430. Gow on Part. ch. 5, § 2, p. 240, 3d edit.; Blundell *v.* Winsor, 8 Sim. 613. Dissolution does not release the partnership from their lia-

the partners may agree as they please about their joint property and all the parts of it; and so they may about their joint obligations. And all such agreements are valid, so far as they do not affect the rights of strangers; but, where they do, they are wholly void. Thus, three partners may agree to-day to dissolve, and to divide all the property in a certain way, specifying that one shall have this, another that, and the third that thing. Or they make such an agreement about some one or more things, and not about all. And these agreements determine the property in these things effectually as to the partners themselves. But they are all responsible *in solido* for the debts due by the firm; and all the joint property of the firm is just as liable for the joint debts, after such division or settlement among themselves, as it was before. (*u*)

§ 297. **Dealing with any Partner Protected.** — So, too, it is very common for the partners to agree not only that one of them *may* settle and wind up the partnership concern, but that one or more *shall* wind it up, and for that purpose shall have in full property all the goods or funds and business, or a certain part of them, and shall pay all the debts; and this he undertakes to do. Such an agreement is so far binding on the partners, that, if either of the others is obliged to pay a debt thus assumed by a partner, the partner paying may have his action for the money against the partner who undertook to pay. But, so far as the creditors are concerned, all the partners remain just as responsible to all the creditors, after such an agreement, as they were before. (*v*) Thus, an agreement between the partners, that one of them shall settle up the affairs of the concern, collect and pay the debts, and the like, will not prevent any person from effectually paying to any partner a debt due the firm; (*w*) even though the debtor has notice of the arrangement. (*x*) And a payment, after dissolution, to an insolvent partner, has been held to be good, where

bility on a continuing but still unexecuted contract. Dickson *v.* Indiana Mfg. Co., 63 Ind. 9.

(*u*) Smith *v.* Jameson, 5 T. R. 601; Dickenson *v.* Lockyer, 4 Ves. 36; Cummins *v.* Cummins, 8 Ired. Eq. 723; Wood *v.* Braddick, 1 Taunt. 104; Hoby *v.* Roebuck, 7 Taunt. 157; Graham *v.* Wichels, 1 Cr. & M. 188. In Wood *v.* Braddick, Heath, J., says: "When a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue." See Smyth *v.* Harrie, 31 Ill. 62. And see a somewhat peculiar case on this subject, Mayer *v.* Clark, 40 Ala. 259; and Myers *v.* Smith, 15 Iowa, 181.

(*v*) See Rodgers *v.* Maw, 4 Dowl. & L. 66; Smith *v.* Jameson, 5 T. R. 601.

(*w*) King *v.* Smith, 4 C. & P. 108; Duff *v.* East India Co., 15 Ves. 198; Coombs *v.* Boswell, 1 Dana, 473.

(*x*) Porter *v.* Taylor, 6 M. & S. 156.

the partner was insolvent at the time the firm was formed, and known to be so to the other partners. (*y*) But where the legal or equitable interest in a partnership has been transferred to an assignee, a debtor who should pay a debt to either of the partners, after notice of such assignment, would be liable to the assignee. (*z*) And a payment to the executor of a deceased partner is not good. (*a*)

§ 298. **Consent of Creditor to Special Arrangement.** — Though these agreements between the partners do not affect the creditors, without their consent, yet it is certain that, if, in any case, they do consent, and for sufficient consideration, they become parties to the agreement, and are bound by it. (*b*) The question whether they have assented, and, if so, whether on good consideration, arises sometimes under every form of dissolution; but far more frequently where there is a change among the members, — one or more going out, and one or more new ones coming in. And then it is important to ascertain who are the debtors or the creditors, under an obligation which existed at the time the contract was made; that is, whether a retiring partner is freed from this obligation, or whether an incoming partner has assumed it. We shall consider the principles applicable to these cases more fully when we treat of this particular form of dissolution; at present, remarking only, in the first place, that the consent of the creditors to an arrangement which discharges some of their debtors, may be expressed or implied from circumstances distinctly indicative of their knowledge of the transfer or change of the indebtedness, and of their concurrence and consent; and in the next place, that this concurrence and consent, whether expressed or implied, will not suffice to exonerate the partners whom it is intended to discharge, unless there be a valuable consideration for it. Because, as every creditor has the liability of every partner, he only lessens his security by taking one for the whole; and his agreement to do this can bind him no more than any other agreement to discharge a debt, unless he gains some advantage by it, — which may be, by added security, better terms of payment, more favorable business, or any other benefit, — or unless those whom he discharges undergo, at his instance or request, a loss by reason of his concurrence and consent, by pay-

(*y*) Major *v.* Hawkes, 12 Ill. 298.

(*z*) Gordon *v.* Freeman, 11 Ill. 14. See also Pritchard *v.* Draper, 1 Russ. & M. 191.

(*a*) Wallace *v.* Fitzsimmons, 1 Dall. 248.

(*b*) Buller J., in Tatlock *v.* Harris, 3 T. R. 180.

ing something to him who undertakes to pay the debt, or in some other way benefiting him at their own cost. (*c*)

§ 299. **Notice of Dissolution.** — Another most important subject connected with dissolution is notice. For, on the same principles which hold a principal bound by the acts of his general agent whose authority he had revoked, unless he has given sufficient notice of his revocation, any person who deals with one professing to act for himself and others as partners in a certain firm, and believes that he so acts, and is justified in that belief, either by what those others so held out as partners have done or have failed to do, has both a legal and a moral right to hold them as partners. (*d*) This is true of every dissolution, excepting that by the death of a partner, (*e*) which event is said to operate an universal notice, or, at least, to render a notice unnecessary. But a creditor, having knowledge of a dissolution of a copartnership when he gives credit to it, cannot recover from members who have retired, however the knowledge was communicated to him. (*ee*) And this is true where the dissolution is by the death of a partner, and the debt is contracted with one having knowledge of the death. (*eee*) The chief importance of this requirement of notice, and the principal questions arising under it, belong to cases of dissolution by change, in which the retiring partner must give notice of his retirement, or continue to be held as partner; and we shall consider when notice and what notice is necessary, more fully, when we treat of that form of dissolution. (*f*)

(*c*) See, on these questions, Kirwan *v.* Kirwan, 2 Cr. & M. 617; Thompson *v.* Percival, 5 B. & Ad. 925; Lodge *v.* Dicas, 3 B. & Ald. 611; David *v.* Ellice, 5 B. & C. 196, 1 C. & P. 369; Thomas *v.* Shillibeer, 1 M. & W. 124; Evans *v.* Drummond, 4 Esp. 89; Reed *v.* White, 5 Esp. 122; Heath *v.* Percival, 1 P. Wms. 682, 1 Str. 403; Bedford *v.* Deakin, 2 B. & Ald. 110; Featherstone *v.* Hunt, 1 B. & C. 113; Spenceley *v.* Greenwood, 1 F. & F. 297; Robinson *v.* Wilkinson, 3 Price, 538; Gough *v.* Davies, 4 Price, 200; Blew *v.* Wyatt, 5 C. & P. 397; Hart *v.* Alexander, 7 C. & P. 746; Harris *v.* Farwell, 15 Beav. 31.

(*d*) See Vice *v.* Fleming, 1 Younge & J. 227; Willis *v.* Dyson, 1 Stark. 164; Rooth *v.* Quin, 7 Price, 193; Galwey *v.* Mathew, 1 Camp. 402, 10 East, 264; Pecker *v.* Hall, 14 Allen, 532. A new contract, after dissolution, in the name of the firm, will bind the firm to those who, having previously dealt with the firm, have had no notice of the dissolution. Dickinson *v.* Dickinson, 25 Gratt. 321. See also Lovejoy *v.* Spofford, 93 U. S. 430.

(*e*) Devaynes *v.* Noble, Houlton's Case, 1 Meriv. 616, Johnes' Case, 1 Meriv. 619, Brice's Case, 1 Meriv. 620; Webster *v.* Webster, 3 Swanst. 490; Blades *v.* Free, 9 B. & C. 167; Smout *v.* Ilbery, 10 M. & W. 1; Campanari *v.* Woodburn, 15 C. B. 400. One who suffers his name to be used in a firm after his retirement is responsible to new customers as well as old, who do not have actual knowledge of the change, *Re* Krueger, 2 Low. 66; and is estopped to deny his responsibility, Speer *v.* Bishop, 24 Ohio St. 598.

(*ee*) Davis *v.* Keyes, 38 N. Y. 94.

(*eee*) Stanwood *v.* Owen, 14 Gray, 195.

(*f*) See Chamberlain *v.* Dow, 10 Mich. 319. [See *Post*, § 315 *et seq.*]

§ 300. **Actions and Remedies after Dissolution.** — As the fact of dissolution has no effect whatever on the rights of third persons, or on the rights of the firm against third persons, so it is a general rule, that actions by and against the firm must continue to be what they would have been before the dissolution. That is, all the names of the partners must be used in an action brought by the settling partner, for a debt due to the firm;[1] and, if a debt owed by the firm is sued, not only can all the old partners be sued, (*g*) but it is not enough to make the settling partner sole defendant, even if he have undertaken to pay all the debts of the firm, unless it is intended to discharge all the other partners.

A dissolution may put an end to a right or interest held by a partnership, if it be held on condition that the partnership exists, or if it be of such a nature that the law considers it as existing only while the partnership exists; but not if the continued existence of the right or interest is independent of the existence of the partnership. Thus, a common lease to a firm, from a stranger, is a property which survives the dissolution. All the partners continue to be bound for the rent, and all are entitled to the beneficial use of, or interest in, the lease. But if it is stipulated that it be held during the partnership only, the lease is terminated by the dissolution. (*i*) So, a lease held by the partners, as partners, from one of them, is terminated by the dissolution; and the lessor may at once re-enter, without notice. (*j*)

§ 301. **What Acts Dissolve a Partnership: Outlawry.** — Dissolution of partnership may occur by the act and intent of some of the partners only, or as the effect of some act or condition of theirs. (*k*) Without now speaking of these acts or conditions, which are good cause for a decree of dissolution, we may speak of some which, of themselves, operate a dissolution.[2] One of

(*g*) Dobbin *v.* Foster, 1 C. & K. 323.
(*i*) Waithman *v.* Miles, 1 Stark. 181.
(*j*) Colnaghi *v.* Bluck, 8 C. & P. 464.
(*k*) Peacock *v.* Peacock, 16 Ves. 50; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Crawshay *v.* Maule, 1 Swanst. 508; Miles *v.* Thomas, 9 Sim. 606.

[1] Atkinson *v.* Laing, Dowl. & R. N. P. 16, *contra*, is of very doubtful authority. "The propriety of this decision is more than questionable." 1 Lind. Part. 286.

[2] There are certain acts or events which dissolve a partnership by operation of law. Thus the marriage of a female partner, Brown *v.* Chancellor, 61 Tex. 437; *post*, § 302. So where a male and a female partner intermarry. Bassett *v.* Shepardson, 52 Mich. 3, 17 N. W. 217. Upon the declaration or outbreak of a war, partnership with an enemy is dissolved. Leftwich *v.* Clinton, 4 Lans. 176. Death or bankruptcy of a partner dissolves the partnership as a matter of law (see *post*, §§ 304, 342; ch. xv.). And for a similar reason the sale on execution of a partner's interest in the firm operates as a

these, at common law, is outlawry; and, although we know nothing of this here, we have conviction for felony. In England, where attainder forfeits the property of the convict to the king, who cannot be a tenant in common with a subject, it not only dissolves the partnership, but transfers to the king all the joint property of the partnership. That effect of the rule exists now in England only in theory, if it ever was applied to a case of partnership. In this country we know nothing of it. But still, we suppose that a conviction for felony would here operate a dissolution, of itself, and without waiting for a decree. But it may be open to question whether notice is necessary in this case. If a convicted partner used the name of the firm, apparently in its business, immediately after his conviction, we should say, that it would bind the firm to a party who had no knowledge of the felony, and no especial means of knowledge.

§ 302. **Marriage.** — So, on the marriage of a female partner, the other partner may dissolve the partnership; for all the rights, interests, and property she can hold as partner, pass at once to the husband, by the common law, as completely by marriage as they would by any transfer; and she loses all power of binding herself by any contract. (*l*)

Her husband cannot claim, as matter of right, to be admitted as partner; and if he becomes so by agreement, it is a new partnership. And even if, by some valid contract, the marriage leaves her property under her control, she loses by marriage the power of independent personal action in matters of business, and this would suffice to operate a dissolution. But if any peculiar agreements or trusts, or other circumstances, prevented this marriage from operating a dissolution of itself, a court of equity would deem it sufficient cause for a decree of dissolution, in almost any supposable case. (*ll*)

(*l*) Nerot *v.* Burnand, 4 Russ. 247; and see Brown *v.* Jewett, 18 N. H. 230.

(*ll*) Both Watson and Gow, in their works on partnership, say this question has never been directly decided; but in Nerot *v.* Burnand, 4 Russ. 260, Lord Lyndhurst said: "When did the partnership terminate? It was a partnership for no definite period; and either party, therefore, might at any moment have put an end to it by notice. Miss Nerot married Mr. Burnand, without consulting her brother; or, at least, without his assent. If she chose so to change her situation as to make Mr. Nerot, in point of fact,— if the partnership went on,— a partner with

dissolution. *Post,* § 304; Wilson *v.* Waugh, 101 Pa. 233; Carter *v.* Roland, 53 Tex. 540.

The insanity of a partner does not of itself operate as a dissolution, even after the partner has been adjudged insane by a court. *Post,* § 361; Besch *v.* Frolich, 1 Phil. 172; Raymond *v.* Vaughn, 128 Ill. 256, 21 N. E. 566.

§ 303. **Guardianship.** — On both of these principles combined, a partner who passes under guardianship for any reason — whether improper conduct or weakness of mind or other cause — has, in the first place, his property taken out of his hands, and, in the next place, is deprived of the power of entering into valid mercantile transactions; and, therefore, he must cease to be a partner. The guardian, entering into possession, becomes tenant in common with the other partners, and has a right to an account. But it would seem that such guardianship dissolved the partnership of itself. If not, it would undoubtedly be deemed good cause for a dissolution by a decree. (*m*)

§ 304. **Bankruptcy or Execution.** — Bankruptcy or insolvency is of such magnitude that it will be considered in a chapter by itself. Here we will only say, that the reason why bankruptcy of the firm, or of a partner, necessarily produces a dissolution of the partnership, is, that it operates at once an absolute transfer to assignees of the property of the whole firm, or of the whole interest of the bankrupt partner in the property of the firm. Having no longer any ownership, either in the stock or in the profits, all foundation for the relation of partner is taken away. The very same reason applies, and with the same effect, to any cause or act which takes from a partner all this ownership or interest. It may be his voluntary and absolute transfer for a consideration, or his transfer by way of mortgage; but then it produces dissolution only when the mortgagee takes possession. Strictly and technically speaking, a transfer by way of pledge would have this effect at once, because possession in the pledgee is essential to the nature of a pledge. Or it may be a levy of execution upon the partner's interest and subsequent sale. (*j*) We should

Burnand, Mr. Nerot had a right, the moment he received notice of that step, to act upon it, and say, 'Your marriage has put an end to the partnership.' No delay took place in that respect; for the bill was filed as early as Hilary Term, 1820, the marriage having taken place towards the close of the preceding year. I agree, therefore, with the Vice-Chancellor, in saying that the partnership was dissolved on the 16th of September, 1819." There is, however, some room for doubting if this case holds anything more than that; as it was a partnership for no limited period, either party could put an end to it by notice.

(*m*) Domat, b. 1, tit. 8, § 5, arts. 12, 13; Cod., lib. 4. tit. 37, b. 7; Pothier, Pand. lib. 17, tit. 2, n. 67; 2 Bell's Comm., b. 7, ch. 2, pp. 634, 635 (5th ed.); Griswold *v.* Waddington, 16 Johns. 438, 491; Milne *v.* Bartlet, 3 Jur. 358.

(*j*) In Griswold *v.* Waddington, 16 Johns. 491, Kent, Ch., says: "In speaking of the dissolution of partnerships, the French and civil law writers say, that partnerships are dissolved by a change of the condition of one of the parties, which disables him to perform his part of the duty; as by a loss of liberty, or banishment, or bankruptcy, or a judicial prohibition to execute his business, or by confiscation of his goods. The English law of partnership is derived from the

say, however, that an attachment on *mesne* process would not have this effect, nor any further process until actual transfer, if, in the mean time, the partner retains possession. (*k*)

§ 305. **Assignment.** — Whether a partner has or has not a right to terminate the partnership at his pleasure, (*m*) it is certain that an assignment by one partner, of all his interest in the joint property, to the other partner or partners, operates at once the withdrawal of the assignor and a dissolution of the firm. For here the other partners assent to the transfer, by their acceptance of it; and, therefore, no question could be raised as to the right of the assignor. (*n*) And an assignment to a third person may have the same effect. (*o*)

same source; and, as the cases arise, the same principles are applied. The principle here is, that when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law, as well as common reason, adjudges the partnership to be dissolved." Fox *v.* Hanbury, Cowp. 445; Skip *v.* Harwood, 2 Swanst. 586; Williamson *v.* Wilson, 1 Bland, 418; Gowan *v.* Jeffries, 2 Ashm. 305; Moody *v.* Payne, 2 Johns. Ch. 548; Dutton *v.* Morrison, 17 Ves. 194, 206. Morton, J., in delivering the opinion of the court in Arnold *v.* Brown, 24 Pick. 93, limits the effect as follows: "The insolvency of one or both partners, we think, would not produce this effect. The insolvency of one might furnish to the other sufficient ground for declaring a dissolution. But, in this State, the inability to pay the company or the private debts of the partners, would not, *per se*, operate as a dissolution. In England, bankruptcy, and in some of our States where insolvent laws exist, legal insolvency, may produce a dissolution. Wherever the one or the other operates to vest the bankrupt's or insolvent's property in assignees or other ministers of the law, it would produce that effect. Probably a voluntary assignment by a partner of all his property would do the same. In such cases, the partner, being divested of his property, and rendered unable to perform the duties of a partner, would, of course, cease to be one; and his assignees coming in as tenants in common, and not partners, the partnership would be dissolved." On this, see Crispe *v.* Perritt, Willes, 467, 1 Atk. 133; Hague *v.* Rolleston, 4 Burr. 2174; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, 1 East, 368; *Ex parte* Williams, 11 Ves. 5; Wilson *v.* Greenwood, 1 Swanst. 482; Harvey *v.* Crickett, 5 M. & S. 336; Barker *v.* Goodair, 11 Ves. 78; Marquand *v.* New York Manuf. Co., 17 Johns. 529; Waters *v.* Taylor, 2 Ves. & B. 299. In Habershon *v.* Blurton, 1 De G. & S. 121, it is expressly decided that execution and assignment of the interest of one of the partners in a firm dissolves the partnership. And see Renton *v.* Chaplain, 1 Stockt. (N. J.) 62. So, a sale by one partner of all his interest to his copartner works a dissolution of the partnership, Rogers *v.* Nichols, 20 Tex. 719; or sale to a stranger or partner, Cochran *v.* Perry, 8 W. & S. 262; Reece *v.* Hoyt, 4 Ind. 169; Marquand *v.* The New York Manuf. Co., 17 Johns. 525.

(*k*) On questions connected with the attachment of the property of one member of a partnership, see *ante*, § 253; Estabrook *v.* Messersmith, 18 Wis. 545. See *post*, 305.

(*m*) Equity would probably restrain to prevent irreparable mischief. See Chavany *v.* Van Sommer, 3 Woodd. Lect. 416, n., 1 Swanst. 512, n.; Blisset *v.* Daniel, 10 Hare, 493.

(*n*) Heath *v.* Sanson, 4 B. & Ad. 175; Cochran *v.* Perry, 8 W. & S 262.

(*o*) Jefferys *v.* Smith, 3 Russ. 158; Marquand *v.* N. Y. Manuf. Co., 17 Johns. 525; Horton's Appeal, 13 Pa. 67; Conwell *v.* Sandidge, 5 Dana, 210; Parkhurst *v.* Kinsman, 1 Blatchf. 488. See Merrick *v.* Brainard, 38 Barb. 574. In Buford *v.*

So an assignment, in good faith, by a partner, of all the joint property in trust, for the payment of the debts of the firm, which, as we have seen, may be valid, would seem to operate a dissolution. (*p*) And so would a sale on execution and levy upon the interest of an insolvent partner in the joint property. (*q*) But an attachment alone, in *mesne* process, only gives a lien to the creditor; and does not transfer to him the property, and, therefore, does not dissolve the partnership. (*r*) These cases of assignment to pay debts, and sale on execution, however, belong rather to the subject of dissolution by bankruptcy. Let us consider here what right a partner has to terminate the partnership at his own will, and by his direct action.

§ 306. **Partnerships at Will.** — While the courts have found much difficulty in compelling parties to remain together, when a part of them wish for a separation, it has never been said, that a contract for a partnership, for a time certain, is, as to this limitation, wholly inoperative in law or in equity. On the other hand, it is universally agreed, that where there is no such limitation, — that is, where the contract is not for a certain time, — it is always in the power of any one partner to dissolve the partnership, at his own pleasure, and for no other cause than that pleasure. (*s*) [1]

Neely, 2 Dev. Eq. 481, the general doctrine was assented to; but as the assignment in that case was as security for a debt, and it was agreed by all parties that the assignor should continue in business as the agent of the assignee, it was held that the partnership was not dissolved. And, if, notwithstanding such assignment, the assignor continues to act as a partner, and transacts business as before, there is no dissolution. Taft *v.* Buffum, 14 Pick. 322.

(*p*) See Gordon *v.* Freeman, 11 Ill. 14.

(*q*) Habershon *v.* Blurton, 1 De G. & S. 121; Aspinall *v.* London & N. W. R. Co., 11 Hare, 325; Skip *v.* Harwood, 2 Swanst. 586; Renton *v.* Chaplain, 1 Stock. Ch. 62; Johnson *v.* Evans, 7 M. & G. 240. A purchase by other partners of the share so sold, must be made under circumstánces placing it beyond suspicion; otherwise, the sale will be set aside, the partners being treated as the trustees of the other partner. Perens *v.* Johnson, 3 Sm. & G. 419.

(*r*) Arnold *v.* Brown, 24 Pick. 38.

(*s*) Peacock *v.* Peacock, 16 Ves. 49; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307; Alcock *v.* Taylor, 1 Tamlyn, 506; Crawshay *v.* Maule, 1 Swanst. 495, 508; *Ex parte* Nokes, 1 Mont. on Part. 114, n.; Skinner *v.* Tinker, 34 Barb. 333.

[1] *Dissolution by Act of a Single Partner: Partnership at Will.* — Where no time is named for the continuance of the partnership, it is a partnership at will, and any partner may dissolve it at any time. Blake *v.* Sweeting, 121 Ill. 67, 12 N. E. 67; Fletcher *v.* Reed, 131 Mass. 312; Walker *v.* Whipple, 58 Mich. 476, 25 N. W. 472; McElvey *v.* Lewis, 76 N. Y 373. The same is true of a partnership terminable on sixty days' notice. Swift *v.* Ward, 80 Ia. 700, 45 N. W. 1044. The ordinary method of terminating a partnership at will is by notice to each member of the firm. It is terminated as soon as the notices are received, without the necessity of any action by the other partners. Green *v.* Waco State Bank, 78 Tex. 2. The will may however be exercised in another form; the sale of all interests of a part-

Still it has been intimated that the dissolution must be in good faith, and not unreasonable in point of time or manner, or unne-

ner at will is equally effectual to terminate the partnership. Blaker *v.* Sands, 29 Kas. 551.

It has sometimes been suggested that the exercise of the will by a partner is not effectual to dissolve the partnership unless it is *bona fide.* This seems, however, not to be sound. A notice, though given *mala fide*, does, it would seem, dissolve a partnership at will (Swift *v.* Ward, 80 Ia. 700, 45 N. W. 1044), though it might perhaps give the other partners a claim for damages. See Fletcher *v.* Reed, 131 Mass. 312; Ball *v.* Britton, 58 Tex. 57. Certainly the *bona fide* exercise of the right to dissolve gives the other partners no right to claim damages. Fletcher *v.* Reed, 131 Mass. 312; Walker *v.* Whipple, 58 Mich. 476, 25 N. W. 472. For partnerships which though no term was named were held not to be partnerships at will, see *ante*, § 282.

The exclusion from the business of one partner by his copartner is of course an exercise of the right of dissolution, and the partnership thereupon ceases. But though the excluded partner is no longer interested in the business, the other has certainly no right to an exclusive use of the firm assets. If he takes possession of them, he may be treated as a constructive trustee; and the excluded partner may, it would seem, get the value of his share of the assets, together with the profits realized from the use of such share. Major *v.* Todd, 84 Mich. 85, 47 N. W. 841; Zimmerman *v.* Chambers, 79 Wis. 20, 47 N. W. 947.

A mining partnership is peculiar, in that there is no *dilectus personarum.* Therefore a sale of his interests by one partner does not dissolve a mining partnership; the purchaser takes the seller's place in the firm. Lamar *v.* Hale, 79 Va. 147. Therefore the right to dissolve such a partnership, when there is no fixed term, passes to the purchaser; and he may dissolve by giving notice. Galigher *v.* Lockhart, 11 Mont. 109, 27 Pac. 446.

Dissolution by Act of a Single Partner: Partnership for a Term. — It would seem unreasonable that one partner should have the power by any act of his to dissolve, against the will of his copartner, a partnership for a term. If, for instance, by an assignment of his interest in a partnership to a stranger either partner may force a dissolution, every partnership becomes practically a partnership at will. This has been acknowledged in Michigan to be true. There is no such thing, it is there said, as a partnership indissoluble for a term. It was held that a partner may at any time dissolve a partnership, at least as to liability to third persons upon subsequent contracts, by merely giving notice to them of a refusal to continue liable as a partner. Solomon *v.* Kirkwood, 55 Mich. 256, 21 N. W. 336. And it is ordinarily said that the assignment of a partner puts an end to the partnership. McCall *v.* Moss, 112 Ill. 493; Conrad *v.* Buck, 21 W. Va. 396. It is of course true that under ordinary circumstances this must be so, since the purchaser may file a bill for an account; but the better view seems to be that his right to have the firm wound up may be subject to modification by circumstances. Riddle *v.* Whitehill, 135 U. S. 621.

The act of one partner may certainly be such as to give his copartner a right to consider the partnership at an end. In such a case the dissolution is not properly called the act of a single partner, but of all the partners. Thus where one partner refuses to go on with the business, he ceases to have any right to claim an interest in the business; the other may treat it as a dissolution. Ligare *v.* Peacock, 109 Ill. 94; Miller *v.* Chambers, 73 Ia. 236, 34 N. W. 830; Henry *v.* Bassett, 75 Mo. 89 (*semble*). So where one partner embezzles the assets and runs away, his copartner may treat the partnership as dissolved. Strong *v.* Stapp, 74 Cal. 280, 15 Pac. 835. On the same principle, although the assignment by one partner of his interest should be held not to work a dissolution, against the will of his copartners, the latter would unquestion-

cessarily injurious to the other partners. (*ss*) In order to effect a dissolution in such a case, it is necessary for the partner wishing to dissolve to give notice to the other partners. (*t*)

Where a partnership for a limited period expires, and is continued by an agreement which does not provide for any further limitation, the effect of the original limitation is wholly exhausted, and the new partnership is dissoluble at the will of any partner; although all the other provisions and arrangements are continued over, either expressly or by implication. (*u*) It may be said, however, that where all these are carried over, if they seem distinctly to imply that the partnership must needs continue for a definite period, the law might be more willing to imply such a bargain, than it is, as we have seen, from a mere lease for a time, or from similar circumstances.

§ 307. **Power of Partner to Dissolve by Roman Law.** — The Roman law, as stated in the Digest (*w*) and as explained or exhibited by Domat, (*x*) contains principles on this subject which are not only not expressly adopted in the English or American jurisprudence, but which might seem to be opposed to the highest and clearest authority. It may be inferred from Domat, that every partner has a perfect right to terminate the partnership when he will, even if entered into for a time certain. He must, however, take a convenient and suitable opportunity and method for the exercise of this right; and must do this for honest purposes, and with due regard to the safety and advantage of the other partners. The line is not very distinctly drawn. But it seems that he may, at any moment and for any cause, dissolve the partnership so as to renounce or lose all the benefit of it; but that he would not be permitted to free himself or his pro-

(*ss*) This was so held in the well-considered case of Howell *v.* Harvey, 5 Ark. 270. [Sed qüery : See note 1.]

(*t*) Eagle *v.* Bucher, 6 Ohio St. 295. See also Van Sandau *v.* Moore, 1 Russ. 464 ; Wheeler *v.* Van Wart, 9 Sim. 193.

(*u*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307 ; Crawshay *v.* Collins, 15 Ves. 218. In Booth *v.* Parks, 1 Molloy, 465, the Lord Chancllor states the rule thus : "The partners, after the expiration of the partnership term, continuing to carry on the trade without a new deed, all the old covenants are infused into the new series of transactions, with the single exception of the covenant for duration ; for either may *instanter* dissolve the prolonged partnership, but the original stipulations are continued." See also Gould *v.* Horner, 12 Barb. 601 ; Bradley *v.* Chamberlin, 16 Vt. 613 ; U. S. Bank *v.* Binney, 5 Mason, 176, 185. See *post*, § 310, note (*d*).

(*w*) Dig. lib. 17, tit. 2, l. 14.

(*x*) 1 Domat, tit. 8, § 5, art. 1–8.

ably have the right to treat it as such. It would seem clear that the assignment of his interest by one partner to his single copartner must work a dissolution, since all the partners agree. See *ante*, § 305, note (*n*) ; but see *contra*, Waller *v.* Davis, 59 Ia. 103, 12 N. W. 798.

perty from the just claims of the other partners, which may extend so far as to require that the partnership shall continue for a season. He cannot therefore seize a moment to dissolve a partnership when he sees the opportunity of making a great gain by a separate transaction, which ought, with all its advantages, to belong to the firm. And if he does, in this way and for this purpose, seek to dissolve the partnership, the court would declare the dissolution void, or ineffectual for the time, and the partnership to continue until it could be terminated without wrong to anybody. We think a court of equity would apply similar principles to this question. (*y*)

§ 308. **Power of Equity in Case of Dissolution.** — If we suppose a partner, with wrongful intent, to declare a dissolution at such a time, and for such purposes, or with such an effect, that the Roman law would declare that there was no dissolution, and so preserve the rights of the partners, it may be asked, what an English or American court would do. It would not, we apprehend, deny the right of dissolution, or the fact of dissolution; nor perhaps in any way restrain the partner from the exercise of this right. But, it being settled that the partnership is now dissolved, the whole effect and influence of this dissolution is in the hands and within the power of equity. It may be that the other partners would be subjected to wrong and loss, if the use of the firm name could not be continued in completing its transactions, or otherwise in protection of their interests; and yet that the court would be reluctant to authorize the use of the name of a firm which had ceased to exist. But it is hardly possible that the same results could not be reached in some other way, which would be within the resources of equity. And it must be certain that any court of equity would be willing to use all its authority, in any lawful way, to carry the dissolution into effect; or, in other words, to direct the winding up of the concern in such a way as to protect the honest partners from any loss through the wrongful act or wrongful purpose of a copartner. And if it be true, as we suppose, that equity could always do this, and would always do it when practicable, it follows that the difference between the Roman law and the English, or our own, is only a difference in the rules or methods by which the two systems of law accomplish the same results.

§ 309. **Method of effecting Dissolution.** — There is no exactly defined way in which a partner who has the right to terminate a

(*y*) See Chavany *v.* Van Sommer, 3 Woodd. Lect. 416, n., 1 Swanst. 512, n.; Blisset *v.* Daniel, 10 Hare, 493.

partnership must or should exercise this right. All that is requisite is, that he should make this purpose distinctly known to the other partners; and, as soon as it is known, it takes effect. (*z*) The notice must be explicit; and it is not enough to propose to dissolve on certain terms, unless these terms are accepted. (*a*) So, a notice that a partner's share has been forfeited is not enough; because this is construed to mean merely that the partner named has *ceased* to have any interest in the concern. (*b*) A partner may undoubtedly make this dissolution prospective; and this is the usual way of doing it. It is obvious that only peculiar circumstances could justify a partner, morally speaking, however it might be legally, in saying to his copartners, at once and without notice or preparation: From this moment the partnership ceases to exist. And such conduct would certainly induce a court of equity to examine closely into the motives which led to it, and into the effects resulting from it, that they might prevent injurious consequences. Still, however, it is always possible that there may be good reason for the sudden exercise of this right, of the existence of which there seems to be no doubt, where the partnership is not formed for a time certain. It may be that no other course would prevent the firm from rushing into wasteful and dangerous contracts, or from pursuing a path which might lead to ruin. And, therefore, on the one hand, the court would not *presume* that such a dissolution was wrongful in intent or effect, although they would listen to evidence showing it to be so. And, on the other hand, as soon as such a declaration was made, be its purpose or circumstances what they might, there is no reason for supposing that the partnership would exist a moment longer. (*c*)

(*z*) See *ante*, § 306 and note (*s*).

(*a*) Hall *v.* Hall, 12 Beav. 414; Van Sandau *v.* Moore, 1 Russ. 463; Wheeler *v.* Van Wart, 9 Sim. 193. See Mellersh *v.* Keen, 27 Beav. 236.

(*b*) Hart *v.* Clarke, 6 De G., M. & G. 232.

(*c*) The question whether one partner may, by his own mere will, dissolve a partnership formed for a definite period, has been much discussed in this country and in England. It appears to have been assumed that there is no such power, in Peacock *v.* Peacock, 16 Ves. 57; Crawshay *v.* Maule, 1 Swanst. 508; Wheeler *v.* Van Wart, 9 Sim. 193, 2 Jur. 252; Pearpoint *v.* Graham, 4 Wash. C. C. 232. The right is forcibly maintained in Skinner *v.* Dayton, 19 Johns. 538; Mason *v.* Connell, 1 Whart. 381. In Bishop *v.* Breckles, 1 Hoff. Ch. 534, the court said: "The law of the court then requires something more than the mere will of one party to justify a dissolution. But it seems to me that but little more should be demanded. The principle of the civil law is the most wise. Why should this court compel the continuance of a union, when dissension has marred all prospect of the advantages contemplated by its formation? By refusing to dissolve it, the power of binding each other, and of dealing with the partnership property, remains, when all confidence and all combination of effort is at an end. The object of the contract is defeated."

§ 310. **Need not be by Written Notice.** — The dissolution of the partnership by the act of a partner, or at his will, does not require a written declaration of his will; nor even any especial spoken words, or, indeed, any words whatever. He must manifest his desire of withdrawing from the partnership. He may do this as he pleases; and, however it be done, it has the same effect. But, if he only manifest his desire of leaving the partnership at a future time, this is not a present dissolution. Nor is there any way to manifest the purpose of immediate withdrawal, except by such withdrawal; and this is a dissolution. This could hardly be by act without words. But he may manifest, by a course of action, such withdrawal. He may engage wholly in other business, and take no part whatever in the interests or concerns of the partnership. This would rather make him a silent partner, or give good cause for the other partners to reject him, or perhaps obtain a decree for his removal, than amount to evidence that he had in fact withdrawn himself. It may, however, be said, hypothetically, that such conduct might be carried so far as to have that significance and effect. And then the dissolution would take place, not when the other partners acceded to his wish, but when it became certain what his wish was. The only rule applicable to such questions must be this: The wish of a partner to dissolve a partnership which is at will, while it remains unexpressed, can have no force nor effect; but it operates to cause a dissolution as soon as it is distinctly expressed, whatever be the form or manner of this expression. (*d*)

(*d*) In Van Sandau *v.* Moore, 1 Russ. 463, Lord Eldon says: "The bill proceeds on two grounds: one, that Mr. Van Sandau could by mere notice put an end to the company; the other, that if notice alone was not sufficient for that purpose, yet there has been such conduct on the part of the secretary and other members as to entitle the plaintiff to call for a dissolution; and, in either case, he prays that an account may be taken of the partnership dealings and transactions. Now, though, according to the law of the country, a company or partnership formed by parties agreeing to become copartners may be dissolved at any moment by one of the partners, and though his copartners cannot answer his notice of dissolution by saying, 'Here is your money, get out of the concern, and leave us to ourselves,' (because he has a right to have all the accounts of the partnership dealings and transactions taken, up to that very moment); yet one difficulty which has often occurred to me as of great weight in cases like the present, with reference to the dissolution of the company by notice, is this: What avails it that you give notice to A. B. of putting an end to the company, if you do not give notice to the three hundred other individuals of whom it is composed? Has not every one of these individuals the same common-law right to notice, before the partnership can be dissolved? If, on the other hand, it is said, that it is not necessary to give notice to all the partners, it must be on the ground that the deed has made some provision declaring that notice not to be necessary, which, but for particular provisions, would be necessary; and that case must be proved from the deed itself."

CHAPTER XIII.

OF A CHANGE IN THE PARTNERSHIP.

SECTION I.

OF THE EFFECT OF ANY CHANGE IN THE PARTNERSHIP.

§ 311. **Change in Firm puts End to Partnership.** — The retirement of a partner may take place in many ways. He may simply withdraw, carrying with him and retaining all his interest in the property. Or he may retire, by transferring his interest to a stranger, who then holds it as tenant in common with the other partners. Or he may transfer it to one who is received by the other partners, and becomes a copartner with them. However it takes place, it is plain that, if a partnership consists of but two persons, the retirement of either one puts an end to that partnership. And it may now be considered as a settled rule of the law of partnership, in England and in this country, that the retirement of any one partner from a firm consisting of any number of partners operates a dissolution of that firm. The Institute says, "*Cum aliquis renunciaverit societati, solvitur societas.*" (*a*) In Roman practice, mercantile copartnerships consisting of many partners, if not common, were certainly known. Only of late years has this rule been asserted; and it was qualified by Lord Eldon, who was almost its author, and ever was its highest authority, by the phrase, "unless it was otherwise provided." (*b*) We apprehend, however, that the rule comes of necessity from the very nature of partnership, and admits of no qualification whatever. Thus, if we take the qualification mentioned by Lord Eldon, — that of an express provision to the contrary, — it is plain that, even if it is so provided, the remaining partners can only form a new partnership. The qualification is, therefore, equivalent to saying, that the old partnership is dissolved unless a new one is formed; which is meaningless. We suppose the truth to be, that if a

(*a*) Inst. L. 3, t. 26, § 5; Pothier on Part. ch. 8, § 3, p. 141.

(*b*) Crawshay *v.* Collins, 15 Ves. 228; Peacock *v.* Peacock, 16 Ves. 49; Howe *v.* Thayer, 17 Pick. 95.

partner retires, — whether by voluntary act, bankruptcy, expulsion, or death, or if a new partner comes in, by any means whatever, — in either of these cases, the old partnership ceases to exist. (*c*)

Where a mortgage was given to a firm consisting of "A. and B." to secure advances to the mortgagor, and a third partner was taken in, and the name changed to "A., B., and Co.," and the business was continued and conducted precisely as before, it was held that this addition dissolved the first firm, and that the new firm could not avail themselves of the mortgage. (*cc*)[1]

§ 312. **Old Partnership cannot continue to Exist.** — This rule is directly opposed to a common practice, and, perhaps, to a common understanding. We have in this country many ancient firms, in which there may not be one person who was a partner from the beginning. In England, there are firms which have survived some generations; (*d*) but the name has never been changed, and the business has gone on without deviation or interruption. But we still say that the partnership is dissolved by every change, because every partnership consists of certain persons who are all liable for the debts, who all own a certain joint property, and who all have certain powers to act for and to bind each other. Those who owe the firm owe only them, and those to whom the firm is indebted have claims only on them. If from this partnership any persons go out, or if any come into it, and the old partners and the old debtors and creditors agree, there will be the least possible break to the succession. But this agreement no more makes the old firm identical with the new, than the son's inheritance of his father's property, coupled with an accepted promise to be responsible for all his debts, makes the son the same individual with the father. That this mere agreement, however effectual in sustaining and continuing a business, cannot preserve the identity of the old partnership, may be seen from this supposition: If A., B., & C. have for a long time been partners, and conclude to retire, and D., E., & F. say to them, It is a pity to scatter so profitable a business and lose so good a custom, and we will buy your good-will, and

(*c*) Vulliamy *v.* Noble, 3 Meriv. 614; Crawshay *v.* Maule, 1 Swanst. 509; Crawford *v.* Hamilton, 3 Madd. 251; Scholefield *v.* Eichelberger, 7 Pet. 586; Dyer *v.* Clark, 5 Met. 575; Washburn *v.* Goodman, 17 Pick. 519; White *v.* Union Ins. Co., 1 Nott & McC. 559. See *post*, § 353 *et seq.*

(*cc*) Abat *v.* Penny, 19 La. Ann. 289.

(*d*) See Blisset *v.* Daniel, 10 Hare, 493.

1 So where one partner gave the use of his property to a firm, and afterwards retired, the right to use the property ceased; and an assignee of all the assets of the remaining partners had no right to the property. Rapier *v.* Gulf City Paper Co., 64 Ala. 330. See *in re* Beck's Estate, 19 Ore. 503, 24 Pac. 1038; *post* § 342.

take all your stock, and pay all your debts, and hold by assignment all the debts due to you, and bring to you the consent of all your debtors and creditors, — one would hardly say, that the old firm continued over, or was identical with the new one. One firm succeeds the other; and, if the later firm chooses to adopt the name of the earlier, this does not make them one and the same. And, if one member of the old firm comes into the new firm, this does not make them one. And if all remain but one, or all remain and a new one is added, here also is a new firm, which can no more have the effects and choses in action of the old, nor be liable for its debts, without a new and distinct agreement between all parties interested therein, than if the change were entire, and the name also.

We have dwelt the more strongly on this principle, — and shall have occasion to refer to it again, — because a disregard of it has led to some confusion in the authorities in relation to the rights and obligations of a retiring partner, and of an incoming partner, — a subject which we shall now proceed to consider.

SECTION II.

OF A RETIRING PARTNER.

§ 313. **Liability of Partner after Retiring.** — The right of a partner to retire is the same thing as the right to dissolve a partnership; because retirement is dissolution. This we have already considered; and it has also been stated, that he may retire in either of many ways. The effect of the retirement (excepting so far as mutual agreements vary it) is nearly the same in all. He neither loses property by it, nor relieves himself from any liability. (*f*) [1]

(*f*) But see Savage *v.* Rockwell, 32 N. Y. 501.

[1] Each partner continues liable, after dissolution, upon all contracts of the firm made before dissolution. Dickson *v.* Indianapolis Cotton Mfg. Co., 63 Ind. 9; Goodspeed *v.* Wiard Plow Co., 45 Mich. 322, 7 N. W. 902. Thus where before dissolution a firm of attorneys received a note to collect, a partner is liable for the note or its proceeds after dissolution, though the note was collected and the proceeds converted after dissolution by the other partner. Waldeck *v.* Brande, 61 Wis. 579, 21 N. W. 533. Similarly, where one is requested before the dissolution of a firm to pay its debts, each partner is liable to him for a payment made after dissolution. Lee *v.* Stowe, 57 Tex. 444.

If after dissolution the settling partner gives a note whether in the firm name or in his own, for a firm debt, the liability of the other partner is not discharged. Gardner *v.* Conn, 34 Oh. St. 187; Lutterloh *v.* McIlhenny Co., 74 Tex. 73, 11 S. W. 1063; White *v.* Boone, (Tex.) 12 S. W. 51.

If he retires with the consent of the other partners, there is an implied promise on their part to pay the debts of the firm and save him harmless, but only to the extent of the assets of the firm. He is still liable *in solido* for the debts existing when he retired. But, if he pays more than his proportion, he may have contribution from his former copartners. (*ff*)

§ 314. **Sale of Interest by Retiring Partner.** — If a partner "sells out," — to use a common phrase, — either to the remaining partners, (*g*) or to a stranger, the question may arise whether, in addition to what he actually transfers, he comes under any obligation which a court of law or of equity could recognize. Not unfrequently, the articles of copartnership provide that the remaining partners may take the interest of an outgoing partner at a valuation, or they prescribe other terms; and these agreements a court of equity will enforce. (*gg*) [Whether the selling partner may establish a new business in the same locality has already been considered.[1]] The answer of the law is, that he may do this very thing, with an exception, perhaps, as to the use of the old name. In other words, the purchasers of a partner's share in the property, and the "plant" (as it is called in England), buy the good-will attached to the merchandise, but do not purchase from him any obligation not to lessen the value of what they buy by his interference with it, unless there be an express stipulation to that effect. Then this bargain "in restraint of trade," as it is called, would be governed by precisely the same principles in the case of a retiring partner as if it were a sale of a business by a sole trader to a stranger. These principles are now established with a considerable degree of precision. A promise on a consideration, not to carry on a certain trade within certain limits, is valid, at law as well as in equity. (*i*) But a

(*ff*) Hobbs *v.* Wilson, 1 W. Va. 50.

(*g*) As to how the remaining partner takes, see Dimon *v.* Hazard, 32 N. Y. 65.

(*gg*) Quinlivan *v.* English, 42 Mo. 362.

(*i*) Broad *v.* Jollyfe, Cro. Jac. 596; Mitchell *v.* Reynolds, Fortescue, 296, 1 P. Wms. 181; Davis *v.* Mason, 5 T. R. 118; Bunn *v.* Guy, 4 East, 190; Gale *v.* Reed, 8 East, 80; Bryson *v.* Whitehead, 1 Sim. & S. 74; Young *v.* Timmins, 1 Cr. & J. 331; Proctor *v.* Sargent, 2 M. & G. 20; Hilton *v.* Eckersley, 6 E. & B. 47; Pierce *v.* Fuller, 8 Mass. 223; Stearns *v.* Barrett, 1 Pick. 443; Nobles *v.* Bates, 7 Cow. 307; Chappel *v.* Brockway, 21 Wend. 157; Jarvis *v.* Peck, 1 Hoff. Ch. 479; Grasselli *v.* Lowden, 11 Ohio St. 349. The cases show a gradual enlargement of the rule which prohibits contracts in restraint of trade, until at the present day — at least in this country — almost anything in the contract which can be construed as a limitation of it is deemed sufficient to take it out of the rule. Thus, in Stearns *v.* Barrett, *supra*, a promise not to use certain machines in

[1] *Ante*, §§ 181, 182.

general promise not to carry on a certain trade anywhere, is void as against the policy of the law. (*j*) The courts of England, and still more of this country, are quite liberal in the application of this rule; and almost any limits are sufficient. It may be added that the contract of sale by a retiring partner might contain such phrases as, "I being about to change my business," or "intending to give up all business," or other words so distinctly indicative of his purpose not to interfere with the fullest enjoyment of what he sells, that a court of equity would either construe this as a contract to that effect, or as a fraudulent deception by the seller, and on one or other of these grounds restrain him from injurious interference, although there might not be enough in the contract to sustain an action at law for the breach of it. (*k*)

§ 315. **Notice of Retirement.**—Much the most important question in relation to a retiring partner, is, by what means and to what extent he may terminate his liability for the debts of the partnership, so that it shall attach to no new obligations; and how he may escape from his liability for existing obligations. (*l*)

To the first question, the immediate and general answer is, he must give notice of this retirement, and cannot be held as a partner for any new obligation, by those who have this notice of dissolution or of retirement; (*ll*) nor by those who have knowledge thereof, however communicated. (*lll*) But many nice questions have arisen under the application of this rule. (*m*)

any of the United States, except Massachusetts and Rhode Island, was held good, because "agreements to restrain trade in particular places are valid in law, and may be enforced."

(*j*) Alger *v.* Thacher, 19 Pick. 51; a leading case, which fully presents the earlier authorities, English and American; Hilton *v.* Eckersley, 6 E. & B. 47. See also Jones *v.* Lees, 1 H. & N. 189; Dunlop *v.* Gregory, 10 N. Y. 241; also, cases cited in preceding note.

(*k*) The obligation of the retiring partner is frequently determined by the language of the articles, or in some such way. Thus, where it was provided that, on giving notice, either party should have liberty "to quit the trade and mystery of a brewer," and the other might continue the trade upon his own account, it was held, that the party leaving could not engage in the brewery trade on his own account, but was bound to quit it altogether. Cooper *v.* Watson, 3 Doug. 443, 2 Chitty, 451.

(*l*) See *ante*, § 299. And see Park *v.* Wooten, 35 Ala. 242; Williams *v.* Bowers, 15 Cal. 321. One partner may exempt himself from future liability by giving express previous notice that he will not be bound. Matthews *v.* Dare, 20 Md. 273. See Am. Linen Thread Co. *v.* Wortendyke, 24 N. Y. 550; Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150.

(*ll*) Robb *v.* Mudge, 14 Gray, 534; Lange *v.* Kennedy, 20 Wis. 279.

(*lll*) Davis *v.* Keyes, 38 N. Y. 94.

(*m*) See Vice *v.* Fleming, 1 Younge & J. 227; Willis *v.* Dyson, 1 Stark. 164; Rooth *v.* Quin, 7 Price, 193; Galway *v.* Matthew, 1 Camp. 464, 10 East, 203; Godfrey *v.* Turnbull, 1 Esp. 371; Abel *v.* Sutton, 3 Esp. 108; Kilgour *v.* Finlyson, 1 H. Bl. 155; Bernard *v.* Torrance, 5 Gill & J. 383.

The reason of the rule is perfectly obvious. They whom he authorizes to think him a partner may hold him as such; and being a partner, and being known as a partner, he authorizes all to think him so who do not know that he has ceased to be one. If we suppose no fraud on his part, there is negligence on his part; and, of two innocent persons, he should suffer whose negligence caused the error. (*n*)[1]

§ 316. **Notice how Given.**—The commercial world fully recognizes this necessity of notice; and the custom of giving it is universal. Sometimes personal notice is given orally, or, which is better, by letter to all who deal with the concern; sometimes by advertisement; sometimes only by a change of name upon the signs of the firm, and sometimes by a change in the name of the firm itself; sometimes by all these methods together. In this country, much the most usual methods are advertisement, with a change in the names upon the sign; (*o*) in addition to this, notice

(*n*) Parkin *v.* Carruthers, 3 Esp. 246; Williams *v.* Keats, 2 Stark. 290; Brown *v.* Leonard, 2 Chitty, 120; Newsome *v.* Coles, 2 Camp. 617; Dolman *v.* Orchard, 2 C. & P. 104; Carter *v.* Whalley, 1 B. & Ad. 11; Tombeckbee Bank *v.* Dumell, 5 Mason, 56; Lansing *v.* Gaine, 2 Johns. 300; Ketcham *v.* Clark, 6 Johns. 144, 148; Le Roy *v.* Johnson, 2 Pet. 198, 200; Princeton & K. Turnpike Co. *v.* Gulick, 16 N. J. (1 Har.) 161; Buffalo City Bank *v.* Howard, 35 N. Y. 500; Ennis *v.* Williams, 30 Ga. 691; Pursley *v.* Ramsey, 31 Ga. 619; Ellis *v.* Bronson, 40 Ill. 455; Denman *v.* Dosson, 18 La. Ann. 9; Zollar *v.* Janvrin, 47 N. H. 324.

(*o*) See Wrightson *v.* Pullan, 1 Stark. 375, called Wright *v.* Pulham, 2 Chitty, 121; Watkinson *v.* Bank of Penn., 4 Whart. 432; Prentiss *v.* Sinclair, 5 Vt. 149; Graves *v.* Merry, 6 Cowen, 701; Ketcham *v.* Clark, 6 Johns. 144, 147.

[1] Notice of dissolution of copartnerhip must ordinarily be given in order to protect a retiring partner from subsequent liability upon contracts made in the name of the firm. A retiring partner remains liable to those who have not had sufficient notice of the dissolution. Duff *v.* Baker, 78 Ia. 642, 43 N. W. 463; Stimson *v.* Whitney, 130 Mass. 591; Hixon *v.* Pixley, 15 Nev. 475; Clement *v.* Clement, 69 Wis. 599, 35 N. W. 17.

This is on the ground of estoppel. The retiring partner is not really a partner after dissolution. If he lends money to the continuing partner he is a mere creditor, and may compete with the other creditors in insolvency, or even receive a preference. Richardson *v.* Davis, (Miss.) 11 So. 790. Therefore where defendant retired from a firm and another was admitted, and goods were sold by an old customer to the new firm before notice, and the check of the new firm received after notice, and dishonored, it was held that the creditor had the option, either to hold the old firm, including the defendant, on the ground of estoppel, or the new firm without defendant, but could not hold both defendant and the new firm; and he having sued the new firm, defendant was discharged. Scarf *v.* Jardine, 7 App. Cas. 345.

Notice is not necessary in cases where the dissolution is by act of law. Thus, no notice need be given of dissolution by bankruptcy; all persons must take notice of that. Eustis *v.* Bolles, 146 Mass. 413, 16 N. E. 286. So of dissolution by war. Griswold *v.* Waddington, 15 Johns. 57, 16 Johns. 438; Bank of New Orleans *v.* Matthews, 49 N. Y. 12. As to dissolution by death, see *post*, § 323 *et seq.*

by letter is frequently given to the customers of the firm. If a change is made in the name of the firm, this is the most effectual of all. Indeed, if it be a change which leaves out the name of the retiring partner, it would be, of itself, nearly sufficient and decisive. For every new contract would be in the name of a firm of which he never was a member; and, if the change is by dropping his name, it would seem to be complete notice. It is true, however, that a partner may be not named; and it may be true that a partner who has been active and known may wish to become silent and unknown, and therefore wish his name dropped. In such case, he would still be liable; and therefore he would be liable if the circumstances connected with his supposed responsibility justified strangers or customers in believing this to be the case. (*p*)

§ 317. **Difference as to Notice between Old and New Customers.** — An important distinction is made between those who are customers of the firm, or who have dealt with it as having the retiring partner among the partners, and those who are only new customers, beginning their dealings with the firm after the retirement.[1] For a new customer holds, generally, only those who are

(*p*) 3 Kent Comm. Lect. 43, p. 67; Gow on Part., ch. 5, § 2, pp. 248-251, 3d ed.; Watson on Part., ch. 7, p. 384; 2 Bell Comm., b. 7, pp. 460-643, 5th ed.

[1] *Notice to former customers.*—As to all those who have dealt with the firm before dissolution, there must be actual notice of the withdrawal of a partner to protect him from liability. Moline Wagon Co. *v.* Rummell, 12 F. R. 658, 14 F. R. 155; Bloch *v.* Price, 32 F. R. 562; Nicholson *v.* Moog, 65 Ala. 471; Joseph *v.* Southwark Foundry & Mach. Co. (Ala.), 10 So. 327; Richards *v.* Hunt, 65 Ga. 342; Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495; Strecker *v.* Conn, 90 Ind. 469; Iddings *v.* Pierson, 100 Ind. 418; Rose *v.* Coffield, 53 Md. 18; Sibley *v.* Parsons (Mich.), 53 N. W. 786; Martin *v.* Fewell, 79 Mo. 401; Stoddard Mfg. Co. *v.* Krause, 27 Neb. 83, 42 N. W. 913; Nat. Shoe & Leather Bank *v.* Herz, 89 N. Y. 629; Long *v.* Garnett, 59 Tex. 229; Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 818. Direct notice to the customer is not required; if he had knowledge of the withdrawal, by whatever means, it is enough. Uhl *v.* Bingaman, 78 Ind. 365; Backus *v.* Taylor, 84 Ind. 503. The number of former transactions between firm and customer are immaterial; a single previous dealing with the firm entitles the one so dealing to actual notice of dissolution. Bloch *v.* Price, 32 F. R. 562. But see Rocky Mountain Nat. Bank *v.* McCaskill, 16 Col. 408, 26 Pac. 821. Receipt of notice by the customer must be proved. It is not enough to prove that a written notice was mailed to him. Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495. Notice given to the agent with whom the contract sued on was made is sufficient. Hunt *v.* Colorado Milling & Elevator Co., 1 Col. App. 120, 27 Pac. 873. Where after dissolution a former customer continued to do business with the continuing partner, and received in payment checks signed by him individually, it was held sufficient notice of dissolution. Kehoe *v.* Carville (Ia.), 51 N. W. 166.

Notice to the world.—It is obviously impossible to give actual personal notice of withdrawal to all the world; but in order to escape future liability a retiring partner must take measures to make public the fact of his withdrawal. If he takes proper measures of this sort, he is held to have given sufficient notice of withdrawal to all the

actually partners; because he has no past dealings to furnish a foundation for the belief that the retiring member is a partner. To this rule there are exceptions. Precisely as one who buys for the first time has a valid claim on a party who by his own act or consent is held out as a partner, although he is not one, so a new customer of an old firm may sell to it on the credit of one who has long been known as a partner, and whose retirement has been kept secret. This credit would appear to be justified by the retiring partner, and therefore would hold him. But it would seem that the notice which would destroy this credit with new customers is quite different from that which would have this effect upon old customers. Perhaps a general rule may be stated thus: In respect to persons who have had dealings with the firm, it is necessary to show either notice to them of a dissolution, (*q*) or actual knowledge on their part, or, at least, adequate means of knowledge, of the fact. (*r*) And, as to those who have not been deal-

(*q*) Conro *v.* Port Henry Iron Co., 12 Barb. 54; Graves *v.* Merry, 6 Cow. 701; Ketcham *v.* Clark, 6 Johns. 144; Clapp *v.* Rogers, 12 N. Y. 283; Magill *v.* Merrie, 5 B. Mon. 168; Pope *v.* Risley, 23 Mo. 185; Hutchins *v.* Bank of Tenn., 8 Humph. 418; Deford *v.* Reynolds, 36 Pa. 325; Scheifflin *v.* Stevens, 1 Wins. No. 1, 106.

(*r*) See *infra*. And see Reilly *v.* Smith, 16 La. Ann. 31; Williamson *v.* Fox, 38 Pa. 214; Vernon *v.* Manhattan Co., 17

world except former customers. Joseph *v.* Southwark Foundry & Machine Co. (Ala.), 10 So. 327 (*semble*); Rocky Mountain Nat. Bank *v.* McCaskill, 16 Col. 408, 26 Pac. 821 (*semble*); Richardson *v.* Snider, 72 Ind. 425.

The common method of giving notice is by publication in a newspaper; which is usually sufficient. *In re* Frazer, [1892] 2 Q. B. 633; Rose *v.* Coffield, 53 Md. 18 (*semble*); Polk *v.* Oliver, 56 Miss. 566; Stoddard Mfg. Co. *v.* Krause, 27 Neb. 83, 42 N. W. 913. The newspaper must, however, be one circulating in the vicinity. Richards *v.* Butler, 65 Ga. 593. And it must be one of general, not limited circulation, and published a reasonable number of times. Ellison *v.* Sexton, 105 N. C. 356, 11 S. E. 180. Equity has jurisdiction to compel a partner to sign a notice of withdrawal for publication. Hendry *v.* Turner, 32 Ch. D. 355.

Though publication of notice is the common method by which a retiring partner is protected, it is not the only way. Anything is sufficient which makes knowledge of the withdrawal public. Polk *v.* Oliver, 56 Miss. 566. Therefore, general notoriety is a fact to be considered by the jury. Lovejoy *v.* Spafford, 93 U. S. 430; Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325. Whether the fact is sufficiently public is in a doubtful case a question for the jury. Polk *v.* Oliver, 56 Miss. 566. Merely ceasing to hold out one's connection with the business (as by advertising) is not enough. Uhl *v.* Harvey, 78 Ind. 26. Public change in the firm name by dropping the name of one partner may be; but not a change of name which does not consist of dropping the partner's name, for instance, from "Davis Creamery" to "Beloit Creamery." Coggswell *v.* Davis, 65 Wis. 191, 26 N. W. 557. Organization of a partnership into a corporation is not notice of dissolution, if the two could possibly co-exist. First Nat. Bank *v.* Conway, 67 Wis. 210, 30 N. W. 215. In Elverson *v.* Leeds, 97 Ind. 336, where a sole trader carried on business as "Leeds & Co.," it was held that upon selling out to another he must give notice, like a retiring partner. But see Gathright *v.* Burke, 101 Ind. 590.

ers, a retiring partner can exonerate himself from liability by publishing notice of the dissolution,(*s*) or by showing knowledge of the fact. A notice by public advertisement, in a usual way and to a usual extent, or any notice which, under the circumstances, was equal to a public advertisement, would always be sufficient to protect the retiring partner against new customers; (*t*) because it is obviously impossible for him to know who may thereafter deal with that firm. But he does know or may know who have dealt with it, and may make it sure that they have notice; and therefore it is his duty to make this certain, and he takes upon himself the risk of their ignorance. Mr. Justice Story appears to go so much further as to hold that no new customers can hold the retiring partner, unless he permits his name to be used by the old firm, although he gives no notice whatever. But, in this remark, he goes somewhat beyond the prevailing authorities. And, in his note to the passage, he seems to apply his rule only to new customers who do not know who were the old partners, or who had no reason to believe the retiring partner to have been and still to be one. And such new customers could not, of course, hold a retiring partner. A considerable lapse of time between the retirement, and the contracting of the new debt, would, of course, go very far to show that it was not, or should not have been, contracted on the credit of the retiring partners.(*u*)

§ 318. **Actual Knowledge equivalent to Notice.** — Notice is intended to give knowledge; and therefore knowledge, however acquired, generally renders notice unnecessary, and protects a retiring partner who has done nothing.(*v*) Whether a person has

Wend. 526, 22 Wend. 183; Watkinson *v.* Bank of Penn., 4 Whart. 482; Mitchum *v.* Bank of Ky., 9 Dana, 166; Mauldin *v.* Bank of Mobile, 2 Ala. 502; Coddington *v.* Hunt, 6 Hill, 595; Goddard *v.* Pratt, 16 Pick. 431, 434; *Ex parte* Burton, 1 Gill & J. 207; *Ex parte* Leaf, 1 Deacon, 176; Shurlds *v.* Tilson, 2 McLean, 458; Prentiss *v.* Sinclair, 5 Vt. 149; Pitcher *v.* Barrows, 17 Pick. 365.

(*s*) Parkin *v.* Carruthers, 3 Esp. 248; Gorham *v.* Thompson, Peake, 42; Anderson *v.* Weston, 6 Bing. N. C. 296; Graham *v.* Hope, Peake, 154; Bernard *v.* Torrance, 5 Gill & J. 383; Lucas *v.* Bank of Darien, 2 Stewart, 280; Amidown *v.* Osgood, 24 Vt. 278; Burgan *v.* Lyell, 2 Mich. 102; Johnson *v.* Totten, 3 Cal. 343; Davis *v.* Allen, 3 N. Y. 168; Princeton Turnpike Co. *v.* Gulick, 16 N. J. L. (1 Har.) 161; Clapp *v.* Rogers, 12 N. Y. 283; Magill *v.* Merrie, 5 B. Mon. 168; Simonds *v.* Strong, 24 Vt. 642.

(*t*) Minnit *v.* Whinnery, 5 Bro. P. C. 489, 2 id. (Dublin ed.) 323; Abel *v.* Sutton, 3 Esp. 108; Wrightson *v.* Pullam, 1 Stark. 375, called Wright *v.* Pulham, 2 Chitty, 121; Kilgour *v.* Finlyson, 1 H. Bl. 155; Nott *v.* Downing, 6 La. 680; Lansing *v.* Gaine, 2 Johns. 300; Shurlds *v.* Tilson, 2 McLean, 458; Mowatt *v.* Howland, 3 Day, 353; Taylor *v.* Young, 3 Watts, 339. See also Deering *v.* Flanders, 49 N. H. 225.

(*u*) See Merrit *v.* Pollys, 16 B. Mon. 355. See *post*, § 322.

(*v*) Hart *v.* Alexander, 2 M. & W. 484; Prentiss *v.* Sinclair, 5 Vt. 149; Martin *v.* Walton, 1 McCord, 16.

actual knowledge of a dissolution, is a question of fact for the jury, and not of law for the court.(*w*) But a partner who actually retires as to all his rights and interests may consent to leave his name in the firm, or to a use of it by the old partners; and, while he thus consents, even by his silence alone, if he knows it, he does not retire as to his responsibilities. (*x*) And a customer who knows that he has retired as to his interests, but has no notice, and has no notice of the retirement, may be led to believe that notice is withheld because the partner intends to continue responsible. And, if he is justified in this belief by all the circumstances, however erroneous it might be, the mere knowledge, on his part, of the retirement, without notice, would not prevent him from holding the partner. (*y*) If one of several partners retires, and notice thereof is given, but the business continues

(*w*) Deford *v.* Reynolds, 36 Pa. 325; Hart *v.* Alexander, 2 M. & W. 484; Hutchins *v.* Sims, 8 Humph. 423; Merrit *v.* Pollys, 16 B. Mon. 355. In Deford *v.* Reynolds, *supra*, A. & B., under the style of A. & Co., had done business for some time with C. & Co. In April, 1853, B. retired. Prior to this time, all drafts drawn by C. & Co. were upon the firm of A. & Co., and their letters were so addressed. But from the time of the dissolution, C. & Co. drew on A. alone, and their letters were addressed to him alone. Their accounts were, however, kept with A. & Co. until December, 1853; and their clerk testified that he did not know of the dissolution until this time. The jury found that C. & Co. were ignorant of the dissolution; and the court refused to set aside the verdict, although not satisfied with it.

In Irby *v.* Vining, 2 McCord, 379, it is said to be sufficient evidence of knowledge, if such circumstances be proved as to leave no rational doubt that the party knew of the dissolution. Actual notice is necessary to persons theretofore dealing with the firm. Denman *v.* Dosson, 19 La. Ann. 9; Zollar *v.* Janvrin, 47 N. H. 324; Kirkman *v.* Snodgrass, 3 Head, 370; Austin *v.* Holland, 69 N. Y. 571. Actual knowledge, however obtained, is notice. Davis *v.* Keyes, 38 N. Y. 94; Young *v.* Tibbetts, 32 Wis. 79; Deering *v.* Flanders, 49 N. H. 225. See also Tudor *v.* White, 27 Tex. 584. And the burden of proof of notice is on the partner denying liability on account of dissolution. Kenney *v.* Atwater, 77 Pa. 34. It may be inferred from circumstances; but publication in two newspapers, neither of them published in the place where the creditor resides or taken by him, is insufficient. Howell *v.* Adams, 68 N. Y. 314. Perhaps, if the papers were regularly sent to the creditor, the notice would be sufficient. Roberts *v.* Spencer, 123 Mass. 397.

(*x*) A person who continues to act as a partner after dissolution, is liable as a partner. Emmet *v.* Butler, 7 Taunt. 599; Mulford *v.* Griffin, 1 Fost. & F. 145; Fuldo *v.* Griffin, 1 Fost. & F. 147; Ketcham *v.* Clark, 6 Johns. 144. So it is generally held that a person allowing his name to remain is liable. Parkin *v.* Carruthers, 3 Esp. 248; Williams *v.* Keats, 2 Stark. 290; Dolman *v.* Orchard, 2 C. & P. 104; Stables *v.* Eley, 1 C. & P. 614; Amidown *v.* Osgood, 24 Vt. 278; [Nicholson *v.* Moog, 65 Ala. 471]. But see Jenkins *v.* Blizard, 1 Stark. 418.

In Conro *v.* Port Henry Iron Co., 12 Barb. 56, the court said: "The continuance of the same sign on the store, the form of the bills against the company, not objected to, of notes and receipts given, of notices posted in the name of the company, contracts made in the company name by the president and other officers, and other acts and declarations of the officers, indicated a continuance of the business on the responsibility of the company."

(*y*) Thus, in Brown *v.* Leonard, 2 Chitty, 120, it is held, that a partner who gives notice that he has ceased to be a

to be carried on as before, those partners, as to whom no notice is given, will be presumed to hold the same relation to the concern as before.(z)

§ 319. **Who are Former Customers.** — Whether there has been a previous dealing with the firm — that is, whether a plaintiff had a right to require one kind of notice, or only another — is sometimes a difficult question. That the dealing must be with the firm directly, and not merely the purchase of their paper for a third person, is, we think, evident.(a) A mere purchase for cash would probably not be enough.(b) But selling goods to a firm and delivering them, to be paid for afterwards, although no term of credit is fixed, would make the sellers dealers, and entitle them to notice. (c) So a bank which has previously been in the habit of discounting notes and bills for a firm, (d) or a person who has been in the habit of indorsing for a firm, (e) or of lending his note to it for its benefit, (f) is a dealer. As a general rule, previous dealing, which would entitle a person to notice, most be during the continuance of the partnership; but in one case where goods had been delivered after dissolution, but before any publication of it, at the store formerly occupied by the old firm, in which the retiring partner still remained, though in the capacity of a clerk, and the old sign was up, it was held that the seller was to be considered a dealer, and entitled to notice. (g)

§ 320. **Notice of Retirement of Dormant Partner.** — The same principle which makes this distinction between new customers and old customers protects a dormant or unknown partner who retires and gives no notice whatever.[1] He was bound for any

partner, but who has said that his name is to continue for a certain time, is liable to a person to whom such notice is given, for the acts of the other partners.

(z) Howe v. Thayer, 17 Pick. 91.

(a) Hutchins v. Bank of Tennessee, 8 Humph. 418. See Grinnau v. Baton Rouge Mills Co., 7 La. Ann. 638.

(b) *Dictum* in Clapp v. Rogers, 12 N.Y. 283.

(c) Clapp v. Rogers, 12 N. Y. 283.

(d) Hutchins v. Bank of Tennessee, 8 Humph. 418. See also City Bank v. McChesney, 20 N. Y. 240; City Bank v. Dearborn, 20 N. Y. 244; National Bank v. Norton, 1 Hill, 572. In Vernon v. Manhattan Co., 17 Wend. 524, 22 Wend. 183, the note was the last of a series of accommodation notes. The first note was discounted by the defendants, and renewed several times. It was held that the defendants were dealers. Only those who have *habitually* dealt with a firm are entitled to actual notice. A single transaction does not amount to habitual dealing. Merritt v Williams, 17 Kas. 287; Clapp v. Rogers, 12 N. Y. 283.

(e) Hutchins v. Sims, 8 Humph. 423.

(f) Hutchins v. Hudson, 8 Humph. 426.

(g) Amidown v. Osgood, 24 Vt. 278. In Wardwell v. Haight, 2 Barb. 549, a person who had two previous dealings with a firm was held entitled to actual notice.

[1] A dormant partner, properly so called, is not bound to give notice of withdrawal. Elmira Iron & Steel R. M. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541. But the mere

obligations incurred by the firm while he was in it, because he was then a partner in fact, and not because he was supposed to be one: in other words, he was bound because of his participation in the business and profits, and not because the creditors of the firm became so on his credit. When he leaves the firm, therefore, all the reason for holding him responsible expires; and he is not obliged to give any notice, or take any step to withdraw a credit which never existed. (*h*) A dormant partner is, however, liable for the whole of a debt contracted during his partnership, just as any other partner is. And, if he is known to any customer, so far as relates to that customer he is not a dormant or unknown partner, and, therefore, notice should be given to that customer. Whether the customer was ignorant of the partnership or not, is a question of fact, and sometimes is a difficult one. But a knowledge on his part must be clearly shown, to entitle him to notice, if the partner were generally unknown. (*i*) As the fact of the partnership may have been accidentally divulged without the knowledge or intention of the dormant partner himself, it would always be wise to guard against a danger of this kind, by giving the usual notice. The question has arisen, whether, if A., B., and C. are in business, under the firm and style of A., B., & Co., and C. retires, he is bound to give notice to dealers with the firm who have no knowledge that he is a partner. We exhibit the present state of the authorities in our note. (*j*) In Scotland, a dormant

(*h*) Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Kelley *v.* Hurlburt, 5 Cow. 534; Evans *v.* Drummond, 4 Esp. 89; Armstrong *v.* Hussey, 12 S. & R. 315; Benton *v.* Chamberlin. 23 Vt. 711; Kennedy *v.* Bohannon, 11 B. Mon. 120; Ayrault *v.* Chamberlin, 26 Barb. 89; Warren *v.* Ball, 37 Ill. 76; Ellis *v.* Bronson, 40 Ill. 455.

(*i*) Carter *v.* Whalley, 1 B. & Ad. 11; Farrar *v.* Deflinne, 1 C. & K. 580; Edwards *v.* McFall, 5 La. Ann. 167.

(*j*) In Edwards *v.* McFall, 5 La. Ann. 167, the defendant was a partner of A.

fact that the name of a partner is not disclosed does not bring him within this rule. If he takes part in the business, though not advertised as a partner, he is liable, until notice of withdrawal, to former customers though his connection with the business was not known; for they are cognizant of the financial standing, if not of the personality of the firm. Elkinton *v.* Booth, 143 Mass. 479; Elmira Iron & Steel R. M. Co. *v.* Harris, 124 N. Y. 280, 26 N. E. 541; Shamburg *v.* Ruggles, 83 Pa. 148; Shamburg *v.* Abbott, 112 Pa. 6. But as to those who have not dealt with the firm, he need not give notice of withdrawal if his connection with the firm was unknown. Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955; Cook *v.* Penrhyn Slate Co., 36 Oh. St. 135; Benjamin *v.* Covert, 47 Wis. 375, 2 N. W. 625. Any one who knows of the existence of a partner, though dormant, may hold him liable unless proper notice of withdrawal has been given. Beckett *v.* Ramsdale, 31 Ch. D. 177 (C. A.); Lieb *v.* Craddock, 87 Ky. 525, 9 S. W. 838; Clark *v.* Fletcher, 96 Pa. 416.

A special partner in a limited partnership need not give notice of withdrawal. Tilge *v.* Brooks, 124 Pa. 178, 16 Atl. 746.

partner must give notice of dissolution, as well as an ostensible one. (*k*)

§ 321. **Notice must be Reasonable.** — The question, whether notice has been given, or, if given generally, whether it was brought home to the knowledge of a customer, is governed, in the case of a retiring partner, by the rules applicable to a question of notice in other cases. It is usually a mixed question of law and fact; although, if the facts are found, the reasonableness of the notice is properly a question of law only. In England, or at least in London, a usage sanctioned by the courts requires that notice of retirement and dissolution should be given in a newspaper, published in London, under the name of "The London Gazette." (*l*) There, also, all bankruptcies are published ; and it is a cant phrase for becoming a bankrupt, that a party "finds himself in the 'Gazette.'" No such usage is known here, and would be impossible as to any one paper for the whole nation; but it might, perhaps, usefully obtain as to some one paper in each of our principal commercial cities. As the law stands, however, the party giving notice by advertisement may take his choice of newspapers. If, however, he selected one which was very obscure and unknown, or had but little circulation among merchants, it might be a fact

& Co. It was contended that, as his name did not appear in the style of the firm, he was a dormant partner. But the court said : "We are not prepared to say that a person can be styled a dormant partner who enters into a partnership with A., under the style of A. & Co. The words '& Co.' hold out to the world that some one else is concerned besides A. The term 'dormant' seems more properly applicable to the case of a party associating himself in business with A., who transacts the business in his (A.'s) sole name." See Mitchell *v.* Dall, 2 H. & G. 159, 171. Where A. & B. were in business under the name of A. & Co., and a person dealing with the firm did not know that B. was in the firm, it was held that B. was not a dormant partner. Deford *v.* Reynolds, 36 Pa. 325. See also Western Bank of Scotland *v.* Needell, 1 Fost. & F. 461. A similar rule is laid down in Goddard *v.* Pratt, 16 Pick. 428; but the case of Grosvenor *v.* Lloyd, 1 Met. 19, has been thought to countenance the doctrine that an unnamed partner in such a firm would not be bound to give notice in such a case. This inference does not necessarily follow, however ; because the ruling of the court below, upon which the case came up, was somewhat peculiar, and did not present this precise question. The court below had instructed the jury that a secret partner was liable after his withdrawal, if no notice of the dissolution was given. The effect of that instruction was to make the partner designated under the "Co." secret ; and the higher court, by ordering a new trial, may perhaps be taken to have repudiated that doctrine, and to have sustained the contrary doctrine of Goddard *v.* Pratt. See also Benton *v.* Chamberlin, 23 Vt. 711 ; Heath *v.* Sansom, 4 B. & Ad. 172 ; Carter *v.* Whalley, 1 B. & Ad. 11 ; Bernard *v.* Torrance, 5 Gill & J. 583.

(*k*) Hay *v.* Mair, Ross on Part. 639.

(*l*) In Troughton *v.* Hunter, 18 Beav. 470, the partnership had been dissolved by judicial decree. One of the partners refused to sign the notice of the dissolution which had been prepared for publication in "The London Gazette," and it appeared that it was the usage of that paper not to publish any notice unless signed by all the partners. The court ordered the partner to sign the notice.

which would lead a court or jury towards the conclusion that the party intended to satisfy the letter of the law, but not its spirit, and to withhold notice rather than to give it; and, of course, such a notice would not be deemed "reasonable" by the court. A similar remark may be made, but with less force, perhaps, as to the number of times the advertisement was published, and even as to the place which it occupied in the newspaper. There can be but one general rule applicable to all these questions; and that is, that the retiring partner cannot have the benefit of the notice, unless he shows that it was such reasonable and sufficient notice as the usage of merchants requires, (*m*) or brings home actual knowledge of it to the customer. For, even if he tried to prevent the notice from being known, he will still have the full benefit of it so far as it was known.

§ 322. **Circumstances when sufficient Notice.** — If the retiring partner does not publish the fact in any newspaper, it has been held that the mere notoriety of it will seldom or never protect him. (*n*) It is, however, always possible that this notoriety may be so extreme, and so connected by circumstances with an individual customer, that both court and jury would regard it as dispensing with special notice. (*o*) And a sufficient

(*m*) In Grinan *v.* Baton Rouge Mills Co., 7 La. Ann. 638, the business of making bricks and sawing lumber was carried on at Baton Rouge. The members of the firm all lived in New Orleans, where they had an office, kept by an agent. It was held that notice of dissolution published in a paper at Baton Rouge was not sufficient to exonerate those known to be partners as to persons residing at New Orleans, who had had no previous dealings with the firm. See also Deford *v.* Reynolds, 36 Pa. 325. In Wardwell *v.* Haight, 2 Barb. 549, the dissolution of a firm doing business in Rochester was concealed fifteen months; and notice then was published in Rochester six days before goods were purchased in New York on the credit of the firm. The court considered the sellers as dealers, and therefore entitled to actual notice; but said, if they had not been, this notice would have been insufficient. It was also said that a notice must be public and notorious, so as to put the public on its guard. See Bank of the Commonwealth *v.* Mudgett, 45 Barb. 663.

(*n*) Pitcher *v.* Barrows, 17 Pick. 361; City Bank *v.* McChesney, 20 N. Y. 240; Gorham *v.* Thompson, Peake, 42. The testimony of a witness, that he had notice of the dissolution of a partnership at a particular time, cannot be given in evidence in a suit between others, in which the dissolution of the partnership at that time becomes material. Shaffer *v.* Snyder, 7 S. & R. 503.

(*o*) Where a witness testified that he had given notice of the retirement of a partner, and of the general dissolution of the partnership, and that he was "confident that all the neighborhood were notified in two days," and on cross-examination was asked whether he gave such notice to the other creditors as he had testified he gave to the one in question, and he said he had, and gave the names of the persons, — it was held that it was competent to call the persons named, and to prove that such notice had not been given them; but that it was not competent for the other side to call any of the persons named to prove that they had

lapse of time since the retirement might supply the want of notice. (*oo*)

The taking a note of one partner (the firm having been dissolved two years before), signed with the firm name, and the words added, "in liquidation," would be evidence from which the jury might infer knowledge. (*p*) And a change of partnership in a banking-house is sufficiently notified to the customers of the house by a change in the printed cheques. (*q*) So a change in a name painted on a counting-house, and circulars sent to old correspondents, but no public notice given, is sufficient notice to the world. (*r*) But a mere change of name is not always enough; (*s*) nor a change of pursuits, or a removal from the State of one partner; (*t*) nor is the incorporation of the firm; (*u*) or the fact that a deed of assignment, constituting a dissolution, was put on record. (*v*) If the notice was only by advertisement, it must go further [to protect the retiring partner against former customers]. It has been held that proof that the customer regularly received the newspaper was sufficient. (*w*) But the prevailing rule now seems to be, — at least in this country, where, as has been said, we have no one newspaper in which merchants may expect to find all information of this kind, — that it is not enough, of itself, to prove that the very number of the paper containing the advertisement was delivered at his house, or even traced to his hand. (*x*) And, in point of fact, the multiplication of news-

received such notice. Howe *v.* Thayer, 17 Pick. 91.

(*oo*) Farmers' Bank *v.* Green, 30 N. J. L. 316.

(*p*) Merrit *v.* Pollys, 16 B. Mon. 355.

(*q*) Barfoot *v.* Goodall, 3 Camp. 147.

(*r*) M'Iver *v.* Humble, 16 East, 169.

(*s*) As if a firm which consisted of A. B. & C., doing business under the name of A. & B., on the retirement of C. and of A., should do business under the style of B. & D., even if the fact of the change of name were known, it would not be equivalent to notice of the retirement of C., especially if the firm was carried on under a more general designation which remained unchanged. Howe *v.* Thayer, 17 Pick. 91.

(*t*) Lucas *v.* Bank of Darien, 2 Stew. 280.

(*u*) Goddard *v.* Pratt, 16 Pick. 432.

(*v*) Pitcher *v.* Barrows, 17 Pick. 361.

(*w*) For the rule in England, see Godfrey *v.* Turnbull, 1 Esp. 371; Wrightson *v.* Pullan, 1 Stark. 375, called Wright *v.* Pulham, 2 Chitty, 121; Godfrey *v.* Macauley, 1 Peake, 155; Newsome *v.* Coles, 2 Camp. 617; Norwich Nav. Co. *v.* Theobald, Moody & M. 151. But in respect to persons who have been dealers with the firm, notice in the "Gazette," is not sufficient. Graham *v.* Hope, Peake, 154. In Jenkins *v.* Blizard, 1 Stark. 418, it is not stated expressly whether the party sought to be charged with notice was a previous dealer or not; but it would seem that he was from the concluding remarks of Lord Ellenborough. Notice was published in the "Gazette," and once in the "Morning Chronicle." This last paper was taken by the party sought to be charged. It was held that this was evidence to go to the jury of knowledge of the dissolution.

(*x*) Vernon *v.* Manhattan Co., 17 Wend. 526, 22 Wend. 192; Boyd *v.* Cann.

papers, to say nothing of their size, seems to forbid all reasonable inference that he who takes a newspaper, or even reads in it, reads the whole of it, or becomes apprised of all the facts stated in it. But, if it could be shown that the customer's attention was, in any especial way, drawn to the advertisement, — even, perhaps, by being placed prominently before him, — the evidence might be thus made sufficient. But our courts seem to be tending — wisely, as we think — to the requirement of personal notice, by circulars, to all the customers of the firm, if the old name be retained.

§ 323. **To whom Notice should be Given.** — Some question may arise as to the person to whom notice should be given. If given to one of a partnership, in this as in all other cases of *bonâ fide* notice all are certainly bound. (*y*) So, if to an agent, the principal is bound. (*z*) If to a stockholder in a corporation, (*a*) — a bank, for example, — it is no notice to the bank, unless it can be carried further, and shown to have reached those who were intrusted with its management. It has been held, that casual notice, by an advertisement, reaching a director, did not bind the bank. (*b*) And, upon the whole, the actual practice of the country may supply sufficient reason for the distinction. But if a notice were given to a director, expressly for the bank, and to be communicated to the board or cashier and acted upon, this must be sufficient. (*c*) We should doubt, however, whether notice to a stockholder, with a distinct request that he should communicate the fact to the directors or officers, would bind the bank, unless this communication was made; because a stockholder is under no obligation to communicate such information, and has no official authority to receive it. (*d*) It may be considered as a general rule, that, where it is necessary to give notice, it is not sufficient that the necessary steps for this purpose were taken, if notice was not received. (*e*)

10 Md. 118; Pope *v.* Risley, 23 Mo. 185; Watkinson *v.* Bank of Penn., 4 Whart. 482; Hutchins *v.* Bank of Tenn., 8 Humph. 418; White *v.* Murphy, 3 Rich. 369. But see Bank of So. Car. *v.* Humphreys, 1 McCord, 388.

(*y*) Bignold *v.* Waterhouse, 1 M. & S. 249; *Ex parte* Waithman, 1 Mont. & A. 374; Haywood *v.* Harmon, 17 Ill. 417; Bouldin *v.* Paige, 24 Mo. 594. See Lansing *v.* M'Killup, 7 Cow. 416; Powell *v.* Waters, 8 Cow. 670; Watson *v.* Welles, 5 Conn. 468.

(*z*) Page *v.* Brant, 18 Ill. 37.

(*a*) 1 Pars. on Cont. (5th ed.) 77 and notes.

(*b*) National Bank *v.* Norton, 1 Hill, 572. In Lucas *v.* Bank of Darien, 2 Stew. 280, the fact that one partner after dissolution became a director in a bank was not notice to the bank of the dissolution. And see preceding note.

(*c*) National Bank *v.* Norton, 1 Hill, 578; Bank of the United States *v.* Davis, 2 Hill, 264.

(*d*) See cases in preceding notes.

(*e*) Johnson *v.* Totten, 3 Cal. 343.

The principle, that, after a partnership is dissolved, one partner dealing with a person having no notice of the dissolution may bind his late copartner, applies only to transactions in the usual course of the firm's business. (*f*)

§ 324. **Retiring Partner whether discharged from Liability.** — A retiring partner is, as we have seen, liable for the existing debts of the firm, in precisely the same way and to the same extent as before he left it: and yet it is very common for the partners to agree that they who remain, perhaps with the new ones who come in, shall pay all the debts; and the retiring partner, as a consideration for this agreement, gives up or leaves behind him a proportionate part of the joint property.[1] Such an agreement is perfectly valid between the partners; but has no effect at all upon the creditors, unless they become parties to it. (*g*) It follows, therefore, that the creditors of the firm may not only include the retiring partner in any action against the firm, but may satisfy an execution against the firm from his property, as freely as from that of any remaining partner. (*h*) But, when they have done so, the retiring partner has his action against the remaining partners, on their contract to pay that debt. It is usual to add, in the bargain between the partners, a clause of indemnity; but whether they do or do not promise to hold him harmless, if they promise to pay the debt, and he pays it, he has his action. (*i*)

Where, upon a dissolution, it was agreed that the assets of the firm should be placed in the hands of one partner, and he agreed that he would therefrom pay the debts of the partnership, it was held that he had only agreed to apply the assets

(*f*) Whitman *v.* Leonard, 3 Pick. 177.

(*g*) Harris *v.* Lindsay, 4 Wash. C. C. 98, 271; Kirwan *v.* Kirwan, 2 Cr. & M. 617.

(*h*) Lodge *v.* Dicas, 3 B. & Ald. 611; per DeGrey, C. J., 2 W. Bl. 947, and Ld. Eldon, 6 Ves. 119; Harries *v.* Jamieson, 5 T. R. 556; Wooley *v.* Kelly, 1 B. & C. 68. And see Allen *v.* Wells, 22 Pick. 450.

(*i*) Hobart *v.* Howard, 9 Mass. 304; Brewer *v.* Worthington, 10 Allen, 329. See Thurber *v.* Corbin, 51 Barb. 215.

[1] Where upon dissolution one partner agrees to pay the firm debts, the other becomes, as between the two, a mere surety and entitled to the rights of a surety. Thus upon payment of a firm debt he is entitled to the benefit of all securities. Johnson *v.* Young, 20 W. Va. 614. And an extension of time by a creditor who has knowledge of the agreement discharges the retiring partner. Fernald *v.* Clark, 84 Me. 234, 24 Atl. 823; Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42. If a firm creditor with knowledge of this agreement accepts a new note in renewal of the debt it will be held such a giving of time as to discharge the surety. Leithauser *v.* Baumeister, 47 Minn. 151, 49 N. W. 660; Bank *v.* Green, 40 Oh. St. 431; Gates *v.* Hughes, 44 Wis. 332 (*semble*).

to the debts, but did not absolutely assume the payment of them. *(ii)*

§ 325. **Novation by means of Creditors' Consent.** — If, however, the creditors become parties to this agreement, for consideration, they are of course bound by it; and then they cannot sue the retiring partner.[1] In such case, something like the novation of the civil law has taken place. A debt due from the whole firm has been discharged, and a new debt from a part of the firm has been created. The old debt has been paid by the new one. But there must be some consideration for the release of the retiring partner. In almost all cases where the creditor agrees to this, there is some reason for it in fact, which serves as a consideration. Either the retiring partner gives up something because of the assent of the creditor, or the creditor gains something in time, or in business, or in some other way; and there are few cases in the books, and few we apprehend in practice, in which a creditor, who agrees with partners that one of them shall retire and be released from his debt on the engagement of the others to pay it, is afterwards permitted to sue this partner. It is seldom, of course, that such bargains are made in cases of insolvency; for the obvious futility of it, and entire absence of motive for it, or effect from it in such a case, would prevent an attempt to make or carry out an agreement of this kind by an insolvent firm. And, if the firm be solvent, no harm is done to the creditor by limiting his choice among debtors, all or any of whom can pay him.

It is said that the adequacy of the consideration cannot be inquired into. *(j)* And, if a creditor of a firm contracts or

(ii) Topliff *v.* Jackson, 12 Gray, 565.

(j) Lyth *v.* Ault, 7 Exch. 667, per Pollock, C. B.

In Lodge *v.* Dicas, 3 B. & Ald. 611, a creditor of a firm, on its dissolution, agreed to look only to one partner. It was held that the agreement was void for want of consideration. See also David *v.* Ellice, 5 B. & C. 196; Thomas *v.* Shillibeer, 1 M. & W. 124, and Wildes *v.* Fessenden, 4 Met. 12, where this question is discussed at length. Lodge *v.* Dicas is, however, no longer authority in England. In Lyth *v.* Ault, 7 Exch. 667, *debt* was brought against A. & B. A. pleaded that the action was for goods sold to A. & B. as partners; that afterwards A. being about to retire, and the business to be carried on by B. alone, of which the plaintiff had notice, an agreement was made between the plaintiff and defendant, by which the plaintiff was to be paid 12*l.* in part payment of her debt, and the plaintiff was to abandon her claim against A. and look to B. alone. The jury having found the issue of fact in favor of the defendant, a

[1] Where upon dissolution one partner agrees to pay the debts, and a creditor knows of the arrangement and assents to it, there is a novation, and as to him the retiring partner is discharged. Regester *v.* Dodge, 6 F. R. 6, 19 Blatch. 79; Bank *v.* Green, 40 Oh. St. 431.

agrees with a new firm to take their security in discharge of that of the old, the retiring partner is discharged from any liability to pay the debt; and whether such an agreement has taken place is a question of fact for the jury. (*k*) To discharge the retiring partner, however, it is not sufficient to take a new security; but there must be an agreement to discharge him from the liability of the old firm. (*l*)

§ 326. **Implied Consent of Creditors.** — It is quite seldom that creditors of a firm assent to such an arrangement expressly and directly, but it is very common for them to do so by implication; and numerous cases turn upon the question, What circumstances imply such assent on the part of the creditors? The cases we cite will show that the courts construe with some liberality the question of assent; and that of consideration, with so much that it seems to be now almost implied in the assent. (*m*) But a creditor's mere transfer in his ledger of an account against a firm, to the private account of one partner, without the knowledge of the firm, does not preclude the creditor from suing the firm. (*n*)

If the creditor has no security, and no paper evidence of his debt from the firm, and, after the partner retires, he accepts from the new firm, with knowledge of the retirement, the security or paper of the new firm, — this would seem to be not only an assent on his part, but an assent on consideration; for the acquiring either of additional security, or of paper which he may, by discount, at once convert into money, is consideration enough for the promise implied in his assent, even though there is no new partner in addition to the old in the new firm. (*o*)

motion was made for judgment for the plaintiff *non obstante veredicto*, on the ground that there was no new consideration for the agreement. Parke B., said Thompson *v.* Percival, 5 B. & Ad. 925, substantially overruled Lodge *v.* Dicas, 3 B. & Ald. 611. Pollock, C. B., said that it was not easy to make a distinction between the case at bar and Lodge *v.* Dicas; but in that case the defendant was not proved to have known of the agreement of the plaintiff to take the liability of the other partners. Martin B., said: "I think that Lodge *v.* Dicas is overruled, and it is better to say so than to attempt to distinguish between the cases."

(*k*) Harris *v.* Farwell, 15 Beav. 31; Thompson *v.* Percival, 5 B. & Ad. 925.

(*l*) Harris *v.* Farwell, 15 Beav. 31; Bedford *v.* Deakin, 2 B. & Ald. 210.

(*m*) See Hart *v.* Alexander, 2 M. & W. 484; Harris *v.* Lindsay, 4 Wash. C. C. 98, 271; Deland *v.* Amesbury Mfg. Co., 7 Pick. 244.

(*n*) Barker *v.* Blake, 11 Mass. 16. See also Armsby *v.* Farnam, 16 Pick. 318; Averill *v.* Lyman, 18 Pick. 351; Baring *v.* Crafts, 9 Met. 380.

(*o*) Evans *v.* Drummond, 4 Esp. 92; Reed *v.* White, 5 Esp. 122; Thompson *v.* Percival, 5 B. & Ad. 925; Sheehy *v.* Mandeville, 6 Cranch, 264; Stephens *v.* Thompson, 28 Vt. 77; Isler *v.* Baker, 6 Humph. 85. In this latter case, however, the plaintiff had taken a note signed by the firm name, which the court held good as against the signer, but not as against the estate of the deceased partner; an inquisition of lunacy having been found against the latter, after the goods were

If he has securities from the old firm, and gives them up, and receives from the new firm what is only the same, excepting that the paper loses one name and gains another, being that of a present instead of a past firm, — here there is undoubtedly consideration enough, whether the new name be better or worse, commercially speaking, than the name that is lost. (*p*) And if the old security is given up for the new, it seems that the old is so effectually destroyed that, if the creditor afterwards returns the new to the remaining partner or partners, and receives from them the old, this will not revive the obligation of the retiring partner. (*q*)

§ 327. **Old Claim retained as Additional Security.** — If he takes new security, agreeing to hold the retiring partner only as surety for the debt, there must be some consideration, even for this modified discharge; but if there is one, or anything which can be called one, then the retiring partner will be held only as surety, and not as a joint debtor. He will, therefore, be discharged by any indulgence to the remaining partners, who are the principal debtors, which would suffice to discharge any surety; and the general rule here is, that mere delay in calling for the debt does not discharge the surety; (*r*) nor even a promise of delay, if it be not so far binding as to estop the creditor from a suit against the new firm. (*s*) But, if it would have this effect, then it injures the guarantor, because he can no longer secure himself by paying the debt and suing for it in the name of the creditor; and, therefore, by such indulgence he is discharged. (*t*)

bought by the firm, but before the firm note was given. A joint action was brought by the promisee against the administrator of the deceased and the partner who gave the note, and there was a count for the note and one for goods sold and delivered. The court held that the inquisition of lunacy found against the partner, *ipso facto*, dissolved the partnership; but that the note, being good against the giver, discharged the debt of the firm on account; and, a verdict having been found against the joint defendants, ordered a new trial.

In Harris *v.* Lindsay, 4 Wash. C. C. 98, 271, A. & B. were in partnership, and A. retired, and B. went on with another person; and afterwards this firm was dissolved and another formed, which was also dissolved. The amount due from these three firms to a creditor of all of them was consolidated, and three notes given for the amount, signed by B. It was held, that A. was thereby discharged.

(*p*) Bedford *v.* Deakin, 2 B. & Ald. 210; Hart *v.* Alexander, 2 M. & W. 484; Harris *v.* Farwell, 15 Beav. 31; Yarnell *v.* Anderson, 14 Mo. 619. See also Sheehy *v.* Mandeville, 6 Cranch, 264; Stephens *v.* Thompson, 28 Vt. 77; Isler *v.* Baker, 6 Humph. 85.

(*q*) Arnold *v.* Camp, 12 Johns. 409.

(*r*) That mere delay to sue a principal does not discharge a surety, see Freeman's Bank *v.* Rollins, 13 Me. 202; Townsend *v.* Riddle, 2 N. H. 448; Strong *v.* Foster, 17 C. B. 201; Hunt *v.* Bridgham, 2 Pick. 581. See also 2 Pars. on Cont. (5th ed.) 26, note (*f*) and cases cited.

(*s*) In such a case, the agreement is of no effect. Reynolds *v.* Ward, 5 Wend. 501; Hogaboom *v.* Herrick, 4 Vt. 131; Creath *v.* Sims, 5 How. 192.

(*t*) Oakelley *v.* Pasheller, 4 Cl. & F. 207, 10 Bligh, N. S. 548.

If the creditor takes new security, retaining the old, without any specific arrangement, it might be thought that such a transaction implied precisely the change above spoken of; that is, an acceptance of the new firm, who give this security, as principal debtors, and of the former partner as their surety. It seems rather to be regarded, however, as not affecting the liability of the retiring partner at all. And the creditor in such case retains the liability of the retiring partner, although that partner did not himself know that the old securities were retained. (*u*)

Generally, if a person having a demand against a firm gives up the evidence of it to one of the partners, that he may collect it from the others, and thus enables him to represent to the others that he has paid the debt, and they settled with him on this basis, we should not consider the partners so settling as liable to the creditor; but if the partner merely says to them that he has the evidence of the debt, and does not produce it, and they settle with him as above, they do it at their own risk. (*v*)

It is quite clear, that if the creditor, when he receives the new securities, expressly reserves all his rights against the old firm or retiring partner, he retains them unimpaired. (*w.*) And the question always exists, where there is neither express reservation nor express release, whether the whole transaction, illustrated by such circumstances as indicate the intention of the parties, falls within one or other of the principles above stated.

§ 328. **Consent whether implied from Silence.** — Frequently the new firm goes on in its regular business, the accounts of the customers are transferred from the old to the new, and the customers, knowing the retirement and change of parties and transfer of accounts, say nothing, but continue their dealings with the new firm; perhaps depositing and drawing, or buying and selling, or receiving interest and settling accounts, all just as before, taking no particular notice of the change.[1] The question then occurs, What is the legal significance and effect of such conduct?

(*u*) See Harris *v.* Lindsay, 4 Wash. C. C. 271, and cases cited in note (*w*), *infra.*

(*v*) Featherstone *v.* Hunt, 1 B. & C. 1130.

(*w*) Bedford *v.* Deakin, 2 Stark. 178, 2 B. & Ald. 210; Yarnell *v.* Anderson, 14 Mo. 619; Smith *v.* Rogers, 17 Johns. 340.

[1] Mere silence on the part of the creditor is not enough to bind him: an express assent on his part to the arrangement must be shown in order to discharge the retiring partner. Campbell *v.* Floyd, (Pa.) 25 Atl. 1033; Wadhams *v.* Page, 1 Wash. St. 420, 25 Pac. 462; Barnes *v.* Boyers, 34 W. Va. 303, 12 S. E. 708. But see Anderson *v.* Holmes, 14 S. C. 162.

and it seems to be well settled that the mere receiving of interest from the new firm will not discharge the old; (*x*) and although the transferring the old account to the new firm is not necessarily an adoption by the creditor of the new firm as his sole debtors, (*y*) yet this fact, together with the other circumstances of the case, may be evidence from which a jury would be authorized to find that the creditor had impliedly assented to the discharge of the old firm. (*z*) An eminent English judge, speaking of a case in which the retiring partner was held, says: "The court was substituted for a jury in that case; and I very much doubt whether twelve merchants would have determined it as the court did." (*a*) And he appears to think that what the merchants would do, that the court should do.

In respect to the burden of proof, it has been held, that when the liability at a given time of all the partners is proved, the burden is on those of them who seek to escape continued liability, to show a cessation. (*b*)

§ 329. **Liability of Retiring Partner for Trust Money.** — In a few cases, the question has arisen, as to the continued liability of a retiring partner for money applied to partnership uses with the

(*x*) In Gough *v.* Davies, 4 Price, 200, it was held that a person depositing money with his bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank after the dissolution of the original firm and the constitution of a new one, which consists of some members of the old bank and of other persons, discharge the partners who have retired, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them for four years and until their insolvency. In Harris *v.* Farwell, 15 Beav. 31, a customer of a banking firm had deposited money in it on interest. On the death of one of the firm, the business was carried on by the survivors and a new member. A. received interest from the new firm until their bankruptcy, and then made an affidavit that the new firm was indebted to him for money had and received by them to his use. It was held that the fact that interest was paid was not conclusive, because it might have been paid by them as agents, and that the affidavit could not be construed as an agreement to discharge the old firm. See also Daniel *v.* Cross, 3 Ves. 277; Devaynes *v.* Noble, 1 Meriv. 529, 566; Blew *v.* Wyatt, 5 C. & P. 397.

(*y*) See *Ex parte* Appleby, 2 Deacon, 482; Kirwan *v.* Kirwan, 2 Cr. & M. 617.

(*z*) See Thompson *v.* Percival, 5 B. & Ad. 925; Hart *v.* Alexander, 2 M. & W. 483; Brown *v.* Gordon, 16 Beav. 302. In Benson *v.* Hadfield, 4 Hare, 32, there is a *dictum*, that where a partner retires from a firm, and a customer has notice of his retirement, and afterwards continues his dealing with the new firm, without making any claim on the retired partner, a jury may, from the circumstances, presume that the customer agreed to discharge the retired partner, and to accept the new firm as debtors, instead of the old one. In deciding whether such an agreement ought to be presumed, the nature of the dealings subsequently to the retirement, the form of the accounts rendered, the time elapsing, and other circumstances, are most material.

(*a*) Hart *v.* Alexander, 2 M. &. W. 493.

(*b*) Kirwan *v.* Kirwan, 2 Cr. & M. 617.

knowledge of the partners, by one of the partners who had the money in his possession as trust-money. We cannot doubt what the law should be in such cases. In the first place, this is to all intents a borrowing of money by the firm. It may be said, it is a borrowing from one of the partners, and if he agrees with another, who retires, never to call upon him for the debt, there is an end of it. But it is plain that the borrowing is not — at least in equity, and we think that courts of law would adjudicate such a question on principles of equity — a borrowing from the partner who is trustee, but from the *cestui que trust*, or from the trust-fund. It is scarcely possible that such use of trust-money is legal and proper as against the *cestui que trust*, without his express consent. Nothing is gained, therefore, by showing that the legal estate, and all legal rights, are in the lending partner; for, if he exercises these rights in an illegal way, they who are participant of the wrong cannot be permitted to profit by it. We say, therefore, that a retiring partner should be held for such a debt, unless he show, expressly or by sufficient implication, a receipt or release from the parties who are actually interested in the trust-fund, and are competent to give such release, and who give it for some legal consideration. (*c*) But if a partner holding the money of a stranger, as his agent, puts that money into the firm, this does not make the stranger a partner. (*cc*)

§ 330. **Appropriation of Payments.** — The general principles which are applicable to this subject are these: If money is paid, the paying debtor may appropriate it as he will; if he does not, the creditor may; if neither do, the law will appropriate it in such way as will do justice to all parties. (*d*) Of these three rules, the first is clear and unqualified: no doubt exists that one who owes many debts may insist that his payment shall discharge which of them he will; and, if he points it out, the acceptance of the money discharges that debt. (*e*) The second may not be so

(*c*) Dickenson *v.* Lockyer, 4 Ves. 36; Smith *v.* Jameson, 5 T. R. 601.

(*cc*) Harper *v.* Lampsing, 33 Cal. 650.

(*d*) Simson *v.* Ingham, 2 B. & C. 65; Jones *v.* Maund, 3 Younge & C. Exch. 347; Brazier *v.* Bryant, 2 Dowl. P. C. 477; Chitty *v.* Naish, 2 Dowl. P. C. 511; Peters *v.* Anderson, 5 Taunt. 596; Alexandria *v.* Patten, 4 Cranch, 317; Cremer *v.* Higginson, 1 Mason, 338; Franklin Bank *v.* Hooper, 36 Me. 222; Hamilton *v.* Benbury, 2 Hayw. 385; Hargroves *v.* Cooke, 15 Ga. 221; Pennypacker *v.* Umberger, 22 Pa. 492; Sneed *v.* Wiester, 2 A. K. Marsh. 277.

(*e*) Whether the debtor has appropriated the payment or not, is a question of intent for the jury. As to what circumstances will warrant a finding of such appropriation by the debtor, see Tayloe *v.* Sandiford, 7 Wheat. 14; Mitchell *v.* Dall, 2 H. & G. 159, 4 Gill & J. 361; Fowke *v.* Bowie, 4 H. & J. 566; Robert *v.* Garnie, 3 Caines, 14; West Branch Bank *v.* Moorehead, 5 W. & S. 542; Scott *v.* Fisher, 4 T. B. Mon. 387; Stone *v.* Sey-

certain. Some authorities have inclined to require of the creditor an appropriation at the time of payment, saying that, if it be not then appropriated, the law will determine any subsequent appropriation. This is the rule of the civil law. (*f*) But we consider it well settled that this is not the rule of the common law; for although it is clear that a creditor cannot wait until the time of the trial to make his appropriation, (*g*) or, it would seem, until a controversy has arisen, (*h*) yet he is not obliged to make the appropriation immediately, but may wait a reasonable time. (*i*) The reason of the rule would be, perhaps, as well satisfied by saying, that the creditor may make his election and appropriation at any time before a change of circumstances takes place which would vary the rights of the parties, and therefore render an appropriation favorable to the creditor injurious to some one else. (*j*) The right of an appropriation by the creditor is not conclusively exercised by entries in his books, if these are not communicated to the other party; (*k*) but the entries are decisive

mour, 15 Wend, 19; Newmarch *v.* Clay, 14 East, 239; Shaw *v.* Picton, 4 B. & C. 715. If the debtor pay with one intent and the creditor receive with another, the intent of the debtor shall govern. Reed *v.* Boardman, 20 Pick. 441. It is not necessary for the debtor who pays money to make a specific appropriation of it at the time of the payment: it is sufficient, if it can be collected from other circumstances, that he intended at the time of payment to appropriate it to a specific purpose. Shaw *v.* Picton, 4 B. & C. 715; Waters *v.* Tompkins, 2 Cr. M. & R. 723.

(*f*) That this is the rule of the civil law, see Dig. lib. 46, tit. 3, § 1, 3. See also Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 572. In Hill *v.* Southerland, 1 Wash. (Va.) 133, it is said, that it is incumbent on the creditor to make a recent application by entries in his books or papers, and not to keep parties and securities in suspense, changing their situation from time to time, as his interest governed by events might dictate.

(*g*) United States *v.* Kirkpatrick, 9 Wheat. 737.

(*h*) See *dicta* in United States *v.* Kirkpatrick, 9 Wheat. 737, per Story, J.; Fairchild *v.* Holly, 10 Conn. 184, per Williams, J.

(*i*) See Fairchild *v.* Holly, 10 Conn. 184, per Williams, J.; Alexandria *v.* Patten, 4 Cranch, 317; Simson *v.* Ingham 2 B. & C. 65.

(*j*) In Alexandria *v.* Patten, 4 Cranch, 317, the judge in the court below ruled, that if the debtor at the time of making the payment did not direct to which account it should be applied, then the creditor might immediately make the application; "but such application must have been recent, and before any alteration had taken place in the circumstances of" the debtor. In delivering the opinion of the court, granting a new trial, Marshall, C. J., said: "No principle is recollected which obliges the creditor to make this application immediately . . In declaring that the election, which they supposed to devolve on the plaintiff, if the application of the money was not understood at the time by the parties, was lost if not immediately exercised, the court erred." No notice appears to have been taken of the other branch of the ruling, viz., that the application must be before any change of circumstances, which certainly appears to be a reasonable rule.

(*k*) In Simson *v.* Ingham, 2 B. & C. 65, there were transactions between a London banking company and a country firm. On the death of one of the members

of the question, if the charges are made by the consent of all the parties. (*l*)

§ 331. **Appropriation by New Firm.** — We apply these principles to the case of a retiring partner, thus: For the debts existing when he retires, he continues responsible; for new ones, created after his retirement (the requisite notice having been given), he is not responsible; and when the remaining partner, or the new firm, *pay* money after his retirement, if that is appropriated to the old debts, it relieves the retiring partner; if to the new debts, the old debts are not paid, and the retiring partner remains responsible.

Now, the firm which pays is the paying debtor; and, by the first rule above stated, has the right of appropriating its payment. Nor is there any limit to the exercise of this right, excepting the universal limit, that it must not be exercised fraudulently. If the new firm pay money which is a part of its old fund or of the profits of its old business, and which the retiring partner had a right to have appropriated to the old debts, and believed was so appropriated, any appropriation by the new firm of such payment to the new debts would be fraudulent, and therefore void so far as the new firm was concerned. If the receiving creditor knew nothing of the appropriation, he could not, on learning it afterwards, set it up against the retiring partner; if he knew it and the accompanying facts, he would be participant in the fraud, and therefore could not enforce it; if he knew the appropriation, but did not know the attendant circumstances, and therefore was personally innocent, the question would be more difficult. We should say, however, that the retiring partner now would not be bound by it. It would be somewhat like a transfer of his property, without his consent or authority, which could give no title to

of the country bank, a balance was due the London bankers. During the month following, the London banker received sums in payment more than sufficient to discharge the balance due; but during the same time they advanced money on account of the country bank, to an equal amount. At first, the London bankers entered in their books all receipts and payments, made after the death of the deceased partner to the account of the old firm; but they did not send any account to the country bankers until two months after the death of the deceased partner, and then they sent two distinct accounts, — one the account of the old firm up to the time of the death of the partner; and the other, a new account, containing all payments and receipts subsequent to that time. The court held that the entry of the payments to the credit of the old account, by the London bankers, not being communicated to the country bank, did not amount to a complete appropriation; and that the London bankers might apply the payments received subsequently to the death of the deceased partner to the debt of the new firm. See also Barker *v.* Blake, 11 Mass. 16.

(*l*) Allcott *v.* Strong, 9 Cush. 323.

it even to an innocent holder. Nor could the holder complain; because, not having himself appropriated the money, he would be in the same position as if the firm had not. (*m*)

But if the new firm, honestly, and for adequate business causes, appropriated the payment to the new debts, — as, for example, because they had bought goods on a very short credit of an old customer whose earlier claims had not matured, or in any such cases, — the appropriation would doubtless bind the retiring partner.

§ 332. **Appropriation by Creditor.** — If the paying firm make no appropriation at all, the receiving creditor may make any which is honest. If, in expectation of the insolvency of the new firm, he discharged their debts, leaving those unpaid on which he could hold the retiring partner, it might well be doubted whether this appropriation was honest, and therefore whether it was valid. So, if he made no appropriation until he had learned the insolvency of the new firm, and then made his entries so as to hold the retiring partner, this would not be valid. (*n*) But, as before, an appropriation made by him of unappropriated payments, made in a manner and at a time not indicative of wrongful purpose, would be binding on all parties. It scarcely needs to be said, that no party, having distinctly made an appropriation, would be permitted afterwards to change it, for his own benefit and to the injury of others. (*o*)

§ 333. **Appropriation by the Law.** — If the appropriation became matter of law, the leading principle would be, to do justice by it to all concerned, and the first rule for carrying this into effect is, to appropriate payments in order of time; that is, the first payment would be appropriated to the oldest debt, the next to the next, and so on. And no general equities between the parties would be suffered to disturb this order, unless they were very

(*m*) Thompson *v.* Brown, Moody & M. 40. See also Fairchild *v.* Holly, 10 Conn. 175; Johnson *v.* Boone, 2 Harr. (Del.) 172; Sneed *v.* Wiester, 2 A. K. Marsh. 277.

In Smith *v.* Wigley, 3 Moore & S. 174, W. & T. were partners, and indebted to the plaintiff. They dissolved the partnership, and T. became indebted afterwards on his separate account. It was held, that payments by T. after the dissolution must go in reduction of the entire account, and discharge the earliest items; and that the case of Thompson *v.* Brown, *supra*, did not apply because T. was liable to the plaintiff for the entire debt due upon both accounts. But in such a case it has been held, that the creditor may apply the payment in discharge of the individual debt, and not to the debt due by the firm.

(*n*) See cases *ante*, § 330, and notes.

(*o*) This principle is admitted in Simson *v.* Ingham, 2 B. & C. 65. See *ante*, § 330, note (*i*).

strong. (*p*) But the court would respect any indication of appropriation arising from the payments themselves. Thus, if, when purchases were made, bills were given, a bill for each purchase, each identified by its exact amount, or by the term of credit, or both, the payment of money for that bill would of course not only take it up, but would pay for that purchase; and the same principle would require that if no bills were given, but purchases were made on definite credits, payments answering exactly in time and amount to those credits would be appropriated to them, without inquiring whether these were earlier or later debts. (*q*) And, generally, any payments of which the appropriation seemed to be indicated or required by business arrangements would be adopted by the courts. (*r*)

§ 334. **Appropriation to Debt of Owner.** — One of the most certain indications might arise from asking to whom did the money belong. It is perfectly obvious that if the money belongs to an old firm, it must pay the debts of that firm; if to the new firm, it must pay their debts. Indeed, this is saying no more than "No creditor can pay the debt of one person with the money of another." (*s*) If a person has an account with a banking firm

(*p*) See cases in the two following notes.

(*q*) See Taylor *v.* Kymer, 3 B. & Ad. 320. Thus, where an agent who had, in a previous account, charged himself with a balance due from him, continued to receive money for his principal and to pay money out, it was held, that his payments were not necessarily to be first applied to the extinction of the previous balance, where the receipts were equal to the payments. Lysagt *v.* Walker, 5 Bligh, N. S. 1.

(*r*) See Taylor *v.* Kymer, 3 B. & Ad. 320; Stoveld *v.* Eade, 4 Bing. 154; Newmarch *v.* Clay, 14 East, 240. In Wickham *v.* Wickham, 2 Kay & J. 478, J. F. & Sons, as agents of the plaintiffs, supplied goods to the firm of S. & W. upon the footing of the latter becoming debtors to the plaintiffs. They also supplied the same firm with other goods on their own behalf, and made no distinction in their accounts. E. F. was a partner in both firms. It was held, that communications made by the firm of J. F. & Sons to the plaintiffs, admitting a large debt due from the firm of S. & W., and undertaking that E. F. would use his influence as a partner with S. & W. to secure its reduction, upon the faith of which communication the plaintiffs forbore to sue S. & W., precluded the firm from treating their debt to the plaintiffs as one which had been liquidated by the appropriation of the payments made by them to the firm of J. F. & Sons, in order of date. In Henniker *v.* Wigg, 4 Q. B. 793, where a bond was given to secure payments by A to B. of a specified sum, and certain payments were afterwards made by A., Lord Denman, C. J., after stating the general rule, that, where there is an open account, the first item on the debit side is discharged by the first item on the credit side, said: "But it is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case; and this would be the effect in the present instance, if it should appear that this bond was given to secure the plaintiffs against advances which they might from time to time make to the defendant."

(*s*) See cases, *ante*, §§ 330, 331, and note (*l*).

which is dissolved, and his account continues as before, so that the transactions before and after the dissolution are comprised in one account, payments made by the new firm are construed to be in liquidation of the earliest items on the joint account, and not of the new account merely. (*t*) And if, upon the dissolution, the old account is struck, and the balance due carried to a new account, and debts are afterwards incurred and payments made generally, the payments are first applied to liquidate the first item, — the balance of the old account. (*u*) But, if a new account is opened with the new firm, the creditor may apply a general payment to the new account. (*v*) And, in general, the doctrine of appropriation, and the right of election, apply only where the debts or accounts are distinct in themselves, and are so regarded and treated by the parties. If the whole may be considered as one continuous account, the general rule is, that the payments are to be applied to the earliest items of the account. (*w*)

(*t*) Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 572; Pemberton *v.* Oakes, 4 Russ. 168; Simson *v.* Ingham, 2 B. & C. 65, per Bayley, J.; Simson *v.* Cooke, 1 Bing. 452; Williams *v.* Rawlinson, 3 Bing. 71; Field *v.* Carr, 5 Bing. 13; Bodenham *v.* Purchas, 2 B. & Ald. 39; Smith *v.* Wigley, 3 Moore & S. 174; Livermore *v.* Rand, 26 N. H. 85; Allcott *v.* Strong, 9 Cush. 323; Farnam *v.* Boutelle, 13 Met. 159. See also Pennell *v.* Deffell, 4 De G. M. & G 372; Beale *v.* Caddick, 2 H. & N. 326. And this rule applies as well between partners themselves as between partners and third persons. Toulmin *v.* Copland, 3 Younge & C. (Exch.) 625, 7 Cl. & F. 349. In Newmarch *v.* Clay, 14 East, 239, there were three partners, one of them being dormant and unknown. Goods had been furnished to them by the plaintiff, and bills received in payment. The partnership was then dissolved, the dormant partner retiring. Other goods were then furnished, and the bills given before the dissolution of the partnership were dishonored, and new bills given, which were more than sufficient to cover the debts of the old partnership. It was held that the delivering up the old bills, on receipt of the new, was evidence of a particular appropriation of the new bills in payment and discharge of the old debt, of which the dormant partner might avail himself in an action on the case for goods sold and delivered, brought against him jointly with the other two partners.

(*u*) Sterndale *v.* Hankinson, 1 Sim. 393; Allcott *v.* Strong, 9 Cush. 323.

(*v*) Logan *v.* Mason, 6 W. & S. 9. See Simson *v.* Ingham, 2 B. & C. 65, cited *supra*, § 330, note (*j*).

(*w*) Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 609. See also Brooke *v.* Enderby, 2 Br. & B. 70; Smith *v.* Wigley, 3 Moore & S. 174; United States *v.* Kirkpatrick, 9 Wheat. 720; Jones *v.* United States, 7 How. 681; Postmaster-General *v.* Furber, 4 Mason, 332; United States *v.* Wardwell, 5 Mason, 82; Gass *v.* Stimson, 3 Sumner, 98; Fairchild *v.* Holly, 10 Conn. 175; McKenzie *v.* Nevius, 22 Me. 138; United States *v.* Bradbury, 2 Ware (Daveis), 146. In Bank of Scotland *v.* Christie, 8 Cl. & F. 214, the doctrine of Clayton's Case was applied to payments made to a bank by surviving partners, on a debt due from the firm to the bank. But payment will not be applied to the earliest items in an account if a different intention is clearly expressed by the debtor, or by both parties, or where such intention can be gathered from the particular circumstances of the case. See Taylor *v.* Kymer, 3 B. & Ad. 320; Henniker *v.* Wigg, 4 Q. B. 792; Capen *v.*

§ 335. **Wrong of Debtor as affecting Application of Payments.** — If debtors commit a breach of trust in respect to certain property, and afterwards make payment generally on account to their creditor, who is ignorant of the breach of trust, these payments are not considered as payment of the trust account, although it is earlier in date than the other items. (*x*) And if payments are made on an open account for advances, and some of these grew out of illegal transactions, the payments are to be appropriated to the reduction of the legal, and not the illegal, part of the demands. (*y*)

SECTION III.

OF AN INCOMING PARTNER.

§ 336. **Liability of Incoming Partner.**—A new partner is of course liable for all the subsequent debts of the firm, in the same manner as any other partner; and it is equally obvious that he is not liable for the old debts, unless he assumes them for consideration. (*z*)[1] If, however, he assumes them at all, there is con-

Alden, 5 Met. 268; Dulles *v.* De Forest, 19 Conn. 190; Wilson *v.* Hirst, 1 Nev. & M. 742; Beall *v.* McCullough, 27 Md. 645.

(*x*) Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 572. This case decided two points. First, that above stated; and second, the following: Clayton deposited exchequer bills with a firm of bankers, for safe-keeping; and directed them to take in exchange for them, at their maturity, other bills to be held by them in the same manner, and to apply the proceeds to their own use. There was also a general banking account between the parties. One of the partners died, and the firm some time afterwards became insolvent. Between the death and the bankruptcy, the payments made to Clayton by the survivors exceeded the amount of the cash balance due at the death, and the amount of the bills. But their receipts on his account, during this time, exceeded the sum paid; and the balance due at the bankruptcy, exclusive of the amount of the exchequer bills, exceeded the amount of the balance due at the time of the death. The estate of the deceased partner was held liable for the amount of the exchequer bills.

(*y*) *Ex parte* Randleson, 2 Deac. & Ch. 534.

(*z*) Thus, in Young *v.* Hunter, 4 Taunt. 582, and in Ketchum *v.* Durkee, Hoff. Ch 538, it was held, that the fact that the new partners derived a benefit from goods sold to the old firm did not render them liable for the price of the goods. So, if the goods are ordered before and delivered after he joins, he is not liable. Whitehead *v.* Barron, 2 Moody & R. 248. See also Beale *v.* Mouls, 10 Q. B. 976; Bremner *v.* Chamberlayne, 2 C. & K. 560; Kerridge *v.* Hesse, 9 C. & P. 200; Beech *v.* Eyre, 5 M. & G. 415. And a member of a provisional committee is not liable for services performed for the company after he joins, if they are performed in consequence of an

[1] Where a new partner is admitted to a firm, or an old partner leaves it, a new partnership is formed; and neither the incoming partner nor the new firm is liable for the

sideration enough in his admission into the firm's business to bind him to those from whom the consideration comes. As to others, the question is more difficult. For instance, the new partner, by his contract with the old firm, agrees to assume all the old debts, and be liable for them like the other partners; and they agree that he shall be jointly interested with them in the stock, the business, and the profits. There is no doubt of the validity of this contract as between the partners; and, therefore, if they or any one of them are obliged to pay any of the old debts, they will have as effectual a remedy against the new partner as they would have had if he had been with them when the debts were contracted. It is, however, another question, whether the creditors of the firm can hold the new partner merely on his contract with the old partners.

order given previously to his joining. Newton *v.* Belcher, 12 Q. B. 921. And if goods are sold to a firm, and the old firm is dissolved, and one of the old partners unites with a new one, and forms a new firm, the new partner is not liable on a note given for the goods by the old partner in the new firm's name. Poindexter *v.* Waddy, 6 Munf. 118. See also Shirreff *v.* Wilks, 1 East, 48. In Hart *v.* Tomlinson, 2 Vt. 101, it is held, that a new partner is not liable for an old debt, although the firm name is unchanged, and no notice is given; and that, if the new partner dies pending the suit this makes no difference. In Dyke *v.* Brewer, 2 C. & K. 828, a person agreed with A. to furnish him with bricks whenever he wanted them, at a certain price per thousand. Sometime afterwards, B. became a partner with A., and ordered bricks from time to time, which were used for a partnership purpose. It was held, that each order was a new contract; and that B. was liable as partner for all the bricks received after he became a partner, though the court said, that, if the contract had been for a certain number of bricks at so much per thousand, B. would not have been liable. See also Helsby *v.* Mears, 5 B. & C. 504. But see Scott *v.* Beale, 6 Jur. N. S. 559, for a case the soundness of which seems very questionable. See Sternburg *v.* Callanan, 14 Iowa, 251, confirmed and adopted in Cadwallader *v.* Blair, 18 Iowa, 420; Hartley *v.* Kirlin, 45 Pa. 49; Thrall *v.* Seward, 37 Vt. 573; Updyke *v.* Doyle, 7 R. I. 446; Francis *v.* Smith, 1 Duvall, 121.

debts of the old firm. First Nat. Bank *v.* Hall, 101 U. S. 43; Hatchett *v.* Blanton, 72 Ala. 423; Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787; Bracken *v.* Dillon, 64 Ga. 243; Paradise *v.* Gerson, 32 La. Ann. 532; Parmalee *v.* Wiggenhorn, 6 Neb. 322; Kountz *v.* Holthouse, 85 Pa. 235; Shoemaker Piano Mfg. Co., *v.* Bernard, 2 Lea, 358; McLinden *v.* Wentworth, 51 Wis. 170, 8 N. W. 118.

So where the continuing partners borrow money to pay a debt of the old firm, to the lender's knowledge, or give a new note in renewal of a note of the old firm, the new firm is not liable. Citizens' Nat. Bank *v.* Hine, 49 Conn. 236; Elkin *v.* Green, 13 Bush, 612.

On the other hand, where the new firm borrows money to pay the debts of the old firm, or pays such debts with the proceeds of goods sold to them, it would seem clear that the lender or seller trusted the credit of the new firm, and should be confined to his remedy against it. Penn. Nat. Bank *v.* Furness, 114 U. S. 376. See however Barhydt *v.* Perry, 57 Ia. 416, 10 N. W. 820, where it was held that the seller of goods in such a case was entitled to be subrogated to the rights of creditors of the old firm who had been paid with the proceeds of his goods.

§ 337. **Assumption of Old Debts by Incoming Partner.** — It is said that where a partner comes in, and agrees to take all the stock and be liable for all the debts, it is a novation of the debts, and therefore the new partner is bound. But by the law of novation (which is perhaps the latest law borrowed from the civil law) the new debt is not obligatory, unless the old one is discharged; and the old one cannot be discharged without the consent and concurrence of the creditor. And on this ground the creditor could not hold the new partner merely on his contract with the old ones. If it be said that the creditor's assent to the reception of additional security may be presumed, it must be replied, that this reception of new security may also imply the loss of the old security; for it may be and often is the case, that the new partner takes the place of an old and retiring partner. A bargain between all the parties, including the creditor, that the old partner should be released and the new one taken, would undoubtedly be valid. But the assent of the creditor to such an arrangement cannot be presumed, (*a*) on the ground that it is necessarily advantageous to him. On the whole, we should say that the law of contracts and the law of partnership lead to the conclusion, that the new partner is not bound to the old creditors, unless on a promise to them, for a consideration; (*b*) both of which might of course be indirect, and implied by circumstances.[1] If a person or a firm hold on

(*a*) Catt *v.* Howard, 3 Stark. 5.

(*b*) In Cooke's Bankrupt Laws, 538, it is said, that "where new partners are taken into a trade, and it is agreed that the stock of, and debts due to, the old firm should become the capital of the new partnership, and that the new firm should take upon themselves the payment of the debts of the old firm, and the new partnership becomes bankrupt, — the creditors of the old firm may prove as joint creditors of the new;" citing *Ex parte* Brigham (1792); *Ex parte* Clowes, 2 Brown, C. C. 595, &c. This, however, is not now the law; for it is well settled that, if there is an express contract between the partners that the new ones shall be responsible for the debts of the old firm, the creditors cannot sue upon the covenant, because they are not parties to it. *Ex parte* Williams, Buck, 13; *Ex parte* Freeman, Buck, 471; *Ex parte* Fry, 1 Glyn & J. 96. In *Ex parte* Sandham, 4 Deac. & Ch. 812, it is said, that, to make the new firm liable for the debts of the old, the new partners must adopt the old debts, and the creditors must assent, either expressly or impliedly. See also Ayrault *v.* Chamberlain, 26 Barb. 88. In *Ex parte* Williams, Buck, 13, it is said, that very little would be required to show the assent of the creditors. If a debtor, who has entered into a partnership, proposes to a creditor to transfer his debt to the firm, and the creditor agrees, he cannot prove his debt against the separate estate of the debtor. *Ex parte* Whitmore, 3 Deac. 365. See Stewart *v.* Rogers, 19 Md. 98.

[1] If upon a change in the firm the incoming partner or the new firm agrees to pay the debts of the old firm, the better view would seem to be that stated in the text; that the creditors of the old firm, not being parties to the contract, could not sue upon it. If a creditor agreed (expressly or impliedly) to release from the debt the members

lease real estate, it seems that a new partner, coming in after the lease, will not be holden to the landlord for the rent. But, if he joins with the old partners in a promise to the landlord to pay an increase of rent for a consideration, he will be bound for this increase, although the promise is only oral; but such collateral promise will not bind him for the rent originally payable.(*bb*)

§ 338. **Implied Assumption of Debts.**—Whether the new incoming partner has thus assumed the old debts, is sometimes a difficult question of mixed law and fact. It certainly may be implied by circumstances; and what circumstances should, in any one case, imply it, is a question partly for the court and partly for a jury. Paying of interest on a debt, with a knowledge, without objection, that the new firm pays the interest, would warrant a jury in finding such an assumption of the old debt.(*c*) And perhaps any single fact of like kind would have the same effect. All of these things are evidence for a jury, or matter for a court to infer such adoption. For it must be obvious that a transfer of the account from the old to the new, and payments made on it, through a long course of time, by the new firm, with the knowledge and without the objection of the new partner, would justify a belief that he was submitting to this actual assumption of the old debts because it was for his interest or a part of his bargain.(*d*)

(*bb*) Hoby *v.* Roebuck, 7 Taunt. 157.

(*c*) *Ex parte* Jackson, 1 Ves. Jr. 131. See Kirwan *v.* Kirwan, 2 Cr. & M. 617. Payment of interest by an unincorporated banking association, on a debt existing when a new member comes in, will not of itself show an assumption of such debt by the incoming partner. Shamburg *v.* Ruggles, 83 Pa. 148. See also Babcock *v.* Stewart, 58 Pa. 179.

(*d*) In *Ex parte* Jackson, 1 Ves. Jr. 131, Lord Chancellor Thurlow said: "If

of the old firm, on consideration of the agreement by the new firm to pay, a novation would take place, and the new firm would of course be liable. In many jurisdictions it is held that the new firm is not liable to the creditor without a novation. *Supra*, note (*b*) ; *In re* Isaacs, 3 Sawy. 35; Goodenow *v.* Jones, 75 Ill. 48; Wild *v.* Dean, 3 All. 579; Ayres *v.* Gallup, 44 Mich. 13; Parmalee *v.* Wiggenhorn, 6 Neb. 322; Morehead *v.* Wriston, 73 N. C. 398; Kountz *v.* Holthouse, 85 Pa. 235. So in case of sale to a third party, who promised to pay the debts. Hayes *v.* Knox, 41 Mich. 529, 2 N. W. 670.

In some jurisdictions a third party is allowed to sue upon a contract made for his benefit, though a stranger to it. In these jurisdictions the creditors are of course allowed to sue the new firm upon their agreement with the members of the old firm. Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787; Dunlap *v.* McNeil, 35 Ind. 316; Poole *v.* Hintrager, 60 Ia. 180; 14 N. W. 223; Hannigan *v.* Allen, 127 N. Y. 639, 27 N. E. 402; Peyser *v.* Myers, 135 N. Y. 599, 32 N. E. 699; Shoemaker Piano Mfg. Co., *v.* Bernard, 2 Lea, 358. If a partner of the new firm gives a note to the creditor, in payment of the old debt, the note is clearly authorized, and binds the firm. Silverman *v.* Chase, 90 Ill. 37. Whether the incoming partner or the new firm has assumed the debts is a question which may be proved in each case by the circumstances. Frazer *v.* Howe, 106 Ill. 563; Serviss *v.* McDonnell, 107 N. Y. 260, 14 N. E. 314; Peyser *v.* Myers, 135 N. Y. 599, 32 N. E. 699.

In one case where the new and old partners executed a deed, which recited terms of contract, implying an assumption of the debt, though the words of convenant contained no such agreement, it was held that the new partner was bound by the recital.(*e*) And, in general, whatever might be the form or technical effect of the contract, if in substance it amounted to an agreement by the incoming partner to share in the debts due from the firm, he would be held accordingly.

§ 339. **Incoming Dormant Partner.** — A difference in regard to a new partner, who is to be an unknown and dormant partner, has been pressed, perhaps, too far. There is indeed, no difference between an unknown and a known partner, excepting that the known partner is liable on the credit he gives, as well as on his interest, and the unknown partner on his interest only. If a dormant partner agrees to assume the old debts, he stands in much the same position as a known partner who agrees with his partners to assume them, but makes no promise to the creditors, since they could not have contracted the debts on his credit before he came in. And, if this assumption on the part of the latter binds him to the creditors, a similar assumption on the part of a dormant partner should bind him. (*f*)

§ 340. **Partnership dated back.** — Where the bargain between the partners is, that the new-comer shall be a partner as of a preceding day, here it is held, that he is not bound to the creditor, nor a party to the agreement, for a debt contracted between that previous day and the actual making of the contract, (*g*) although he is bound to the partners for his share of the debt, if they pay it.

§ 341. **Infant Partner after Coming of Age.** — An infant partner, when he comes of age, may, as we have seen, at once escape from

one man, having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable." In Beale *v.* Mouls, 10 A. & E. 976, members of a provisional committee of a company had entered into a written contract for certain machinery. M. then joined the committee, and several payments were made on account of the work, and alterations suggested and adopted with his sanction; and he also took an active part in superintending the work and making experiments with it. It was held that he was not liable on the contract, or on account for goods bargained and sold. And in Saville *v.* Robertson, 4 T. R. 720, it was held that, if no partnership existed at the time of a contract made by one who was afterwards a member of a firm formed subsequently, no subsequent act, by a person who afterwards became a member, — not even an acknowledgment of his liability, or his accepting a bill of exchange drawn on the firm as partners for the very goods, — would make him liable in an action for goods sold and delivered.

(*e*) Vere *v.* Ashby, 10 B. & C. 288.

(*f*) Vere *v.* Ashby, 10 B. & C. 288.

(*g*) Saltoun *v.* Houston, 1 Bing. 433.

all the obligations of the firm, under shelter of his minority. But, if he remains in the firm after full age, he is in a position, in respect to the old debts, somewhat analogous to that of an incoming partner, who assumes the old debts. It is not the same; because he does not adopt or assume the debts of others, but only confirms or leaves valid those debts of his own which he might have avoided. We should say, that this continuance in the firm, and in the business, after full age, would amount to such confirmation by presumption of law. But it seems to be a presumption which may be rebutted. At least, there is no very obvious reason why the partner may not, when he comes of age, distinctly repudiate and annul all obligation or liability for any existing debts, and yet go on with the firm and its business, and so become liable for its future debts. But the general principles of the law of infancy would not permit him to claim his share of the joint funds of the old partnership, and forbid an application of it to the debts of the partnership. Personally, he may escape all liability; but when he comes to demand his share of the funds, and would apply a principle which permits him to take his share before his majority, undiminished by payment of debt, and his share afterwards on the footing of another partner, we are quite sure that he can take no such advantage from his minority, and must lose his share of the profits if he repudiates his liability. (*h*)

SECTION IV.

OF THE DEATH OF A PARTNER.

§ 342. **Dissolution by Death.** — What was said of the necessary dissolution of a partnership, when any change is made in it, is true of the change caused by the death of a partner. Dissolution follows immediately and inevitably. (*j*)[1] This rule has been

(*h*) See *ante*, § 16, note (*k*).

(*j*) This question first came up in Godfrey *v.* Browning, 7 March, 1742 (cited in 2 Ves. Sen. 33), where it was held, that one copartner could not appoint a representative to carry on the trade, after his decease; otherwise, it might fall to the lot of an infant or person not at all fit to

[1] The dissolution takes place as to the survivors as well as the deceased. Hoard *v.* Clum, 31 Minn. 186, 17 N. W. 275. Where it was agreed that a partnership should occupy a building of one of the partners without rent, this agreement came to an end upon the death of one partner, and the survivors thereafter occupying the building must pay rent. *In re* Beck's Estate, 19 Ore. 503, 24 Pac. 1038. See *ante*, § 309.

distinctly declared only of late years; for it was in 1808, or about that time, that Lord Eldon declared, in several cases, that the death of any one in any number of partners dissolves the partnership. And even then that chancellor put in the qualification, as we mentioned in a former section, that the death of a partner operates a dissolution of the partnership, unless provision is expressly made to the contrary. (*k*)

§ 343. **Dissolution necessarily takes place.** — This qualification seems neither necessary, nor accurate. For no provisions made beforehand, in reference to the death of a partner, nor any agreements or arrangements made subsequently to his death, can prevent this dissolution.[1] We have, perhaps, sufficiently indi-

carry it on. In Pearce *v.* Chamberlain, 2 Ves. Sen. 33, a bill was brought by the widow and representative of Pearce, against the representatives of Plummer, for liberty to carry on trade with the defendants. Pearce, the plaintiff's intestate, who had been a servant and brewer for Plummer, was taken into partnership by the latter. A provision was made for the continuance of Pearce in the business in event of Plummer's death. Plummer and Pearce having both died, this bill was brought. The court held, that articles of partnership do not survive for the benefit of executors, &c., without an express provision for such purpose. See Crawshay *v.* Maule, 1 Swanst. 509, 1 Wils. Ch. 181; Canfield *v.* Hard, 6 Conn. 184; Knapp *v.* McBride & Norman, 7 Ala. 28; Williamson *v.* Wilson, 1 Bland, 425; Thornton *v.* Dixon, 3 Bro. Ch. 200; Gillespie *v.* Hamilton, 3 Madd. 251; Crosbie *v.* Guion, 23 Beav. 518. Lord Eldon, in Vulliamy *v.* Noble, 3 Meriv. 614, says: "I conceive that the death of a partner, of itself, works a dissolution of the partnership." And see Dyer *v.* Clark, 5 Met. 575; Washburn *v.* Goodman, 17 Pick. 519; Griswold *v.* Waddington, 15 Johns. 82; Jones *v.* McMichael, 12 Rich. L. (S. C.) 176. In Marlett *v.* Jackman, 3 Allen, 290, the general propositions in the text are supported. And it was held, that, in an action on a promissory note given in the name of a firm by a surviving partner, the other surviving partners, under an answer which avers that the firm had expired and was dissolved before the note was given, may prove that the partnership had been dissolved by the death of one of its members. See Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553, for the effect of the death of one partner on an agent of the firm.

(*k*) There are numerous authorities which hold to this rule; the limitation or proper meaning of which is considered in the text, and in the preceding note. Scholefield *v.* Eichelberger, 7 Pet. 586; Burwell *v.* Mandeville, 2 How. 560; Kershaw *v.* Matthews, 2 Russ. 62; Gratz *v.* Bayard, 11 S. & R. 41; Warner *v.* Cunningham, 3 Dow, 76; Balmain *v.* Shore, 9 Ves. 506. In mining copartnerships, there being usually no *delectus personæ*, dissolution does not necessarily supervene either upon the death of a partner, or upon one partner's selling out his interest. Taylor *v.* Castle, 42 Cal. 367.

[1] The tendency of the modern decisions seems, however, to be that if there is an agreement to that effect in the articles the partnership will not come to an end upon the death of a partner, but will continue in existence. *Supra*, note (*k*); Shaw, appellant, 81 Me. 207, 16 Atl. 662; Edwards *v.* Thomas, 66 Mo. 468; Lewis *v.* Alexander, 51 Tex. 578; Davis *v.* Christian, 15 Gratt. 11. *Contra*, Vincent *v.* Martin, 79 Ala. 540 (*semble*). See Exchange Bank *v.* Tracy, 77 Mo. 594. Such for instance is the case where a joint-stock company is formed, with transferable shares, and it is provided

cated our reasons for this view, in another place. Here, we need only add, that, as the partner who has died cannot by possibility continue a member of the firm, so any firm of which he is not a member, whether it contain his executors or his children, cannot be the same firm as that of which he was a member. (*l*) What is inaccurately called provision against the dissolution of the partnership, is an agreement that, if either party dies, his property shall remain in the firm and in the business, or that his executors shall carry on the business, for the benefit of his children; or that his children, or some one of them, or some other person, shall, immediately on his death, take his place in the firm, and become partner in his stead. All these agreements and arrangements, and all that can be made for a similar purpose, are, in fact, only bargains for the creation of a new partnership when the old one ceases to exist. And so, too, all arrangements or contracts which may be made between the surviving partners and the representatives or appointee of the deceased have for their effect only the formation of a new partnership, which, upon some terms or other, takes the stock, and carries on the business of the old one. And, in the consideration of the questions which arise under such provisions and arrangements, we shall reach more accurate conclusions if we keep this principle in mind.

§ 344. **Interests of the Surviving Partners.** — There is not in partnership the same survivorship as in joint tenancy; but there is a survivorship which is peculiar to partnership. The death of a partner invests the surviving partners with the exclusive right of possession and management of the whole partnership property and business;[1] but only for the purpose of selling and closing

(*l*) Marlett *v.* Jackman, 3 Allen, 290, cited in note (*j*), *supra*. And see the authorities cited in preceding note. And see [Vincent *v.* Martin, 79 Ala. 540;] Humphries *v.* McCraw, 5 Ark. 65: "The death or withdrawal of one member of the firm is always a dissolution of the entire partnership." And Savage *v.* Putnam, 32 Barb. 425: "The ordinary effect of the death of one of the members of a partnership is to work its dissolution. The partnership is ended. The connection has been dissolved, and the future relations of the surviving parties to each other must be determined by some new agreement between them, or by the results which the law pronounces upon their acts and proceedings when no new agreement is in fact made." See also Bank of Mobile *v.* Andrews, 2 Sneed, 535; Knowlton *v.* Reed, 38 Me. 246; Laughlin *v.* Loreng, 48 Pa. 275.

that the decease of a member shall not work a dissolution. Post, ch. xviii; Phillips *v.* Blatchford, 137 Mass. 510; Troy I. & N. Factory *v.* Corning, 45 Barb. 231; Walker *v.* Wait, 50 Vt. 668; McNeish *v.* Hulless Oat Co., 57 Vt. 316.

[1] Clay *v.* Freeman, 118 U. S. 97; Sellers *v.* Shore, 89 Ga. 416, 15 S. E. 494; Willson *v.* Nicholson, 61 Ind. 241; Anderson *v.* Ackerman, 88 Ind. 481; Grim's Appeal,

the same. (*m*) It is not uncommon for articles of copartnership to provide how the surviving partner or partners shall conduct

(*m*) Loeschigk *v.* Addison, 19 Abb. Pr. 169 ; Crawshay *v.* Maule, 1 Swanst. 495 ; *Ex parte* Williams, 11 Ves. 5 ; Peters *v.* Davis, 7 Mass. 256 ; Evans *v.* Evans, 9 Paige, 178 ; Dyer *v.* Clark, 5 Met. 562 ; Gleason *v.* White, 34 Cal. 258 ; Miller *v.* Jones, 39 Ill. 54 ; Remick *v.* Emiz, 41 Ill. 343 ; in this case, rules for the settlement of the partnership funds and accounts are given ; Loeschigk *v.* Hatfield, 5 Robt. 26 ; Crawshay *v.* Collins, 15 Ves. 226. In this last case, Lord Eldon says : "There may be a partnership where, whether the parties have agreed for the determination of it at a particular period or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership ; and the consequence is, that, for the purpose of making good those engagements with third persons, it must continue ; and then, instead of being, as it was, a general partnership, it is a general partnership determined except as it subsists for the purpose only of winding up the concerns. Another mode of determination is, not by effluxion of time, but by the death of one partner ; in which case, the law says that the property survives to the others. It survives, as to the legal title, in many cases ; but not as to the beneficial interest. The question then is, whether the surviving partners, instead of settling the account, and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property, do what they please, and compel the executor to take the calculated value. That cannot be without a contract for it with the testator. The executor has a right to have the value ascertained, in the way in which it is best ascertained, by sale." If this authority of a partner, which continues after a dissolution, for all purposes of winding up, be unduly exercised, the remedy is by applying to the court for the appointment of a receiver. Butchart *v.* Dresser, 4 De G. M. & G. 542. See Allen *v.* Hill, 16 Cal. 113; McKowen *v.* McGuire, 15 La. Ann. 637 ; Roys *v.* Vilas, 18 Wis. 169. But see Skipworth *v.* Lea, 16 La. Ann. 247. The personal note of the survivor, for the firm's debt, is not a satisfaction of the debt, except by special agreement of the parties. Leach *v.* Church, 15 Ohio, 169.

105 Pa. 375 ; Kutz *v.* Dreibelbis, 126 Pa. 335, 17 Atl. 609 ; Hawkins *v.* Capron, (R. I.) 24 Atl. 466.

If the deceased had possession of partnership property at the time of his death, the survivor is entitled to possession at once, and may maintain trover against the executor of the deceased if possession is refused. Hawkins *v.* Capron, (R. I.) 24 Atl. 466. If the property was money, the surviving partner may bring an action against the executor to recover it. Kutz *v.* Dreibelbis, 126 Pa. 335, 17 Atl. 609. In the last case plaintiff and deceased were partners in building a bridge, and payment was to be made, according to the contract, to the deceased or his executor. Payment having been made to the executor, the survivor was allowed an action ; but since there were no debts, and the whole business could be settled in a single action, he was allowed to recover only half the payment.

Choses in action as well as choses in possession pass to the surviving partner ; he has the sole ownership of partnership contracts. Bassett *v.* Miller, 39 Mich. 133 ; Nehrboss *v.* Bliss, 88 N. Y. 600. He alone therefore can sue ; *ante*, § 249.

Since the surviving partner has the complete legal title, he has no right to file a bill in equity to wind up the affairs. McKay *v.* Joy, 70 Cal. 581, 11 Pac. 832.

The representative of the deceased partner has no right to interfere in the business, as by insisting upon a continuance or a sale of it. His only right is a right *in personam* against the survivors to call for an account. Grim's Appeal, 105 Pa. 375. See Haynes *v.* Short, 88 Ala. 562, 7 So. 157. This it is his duty to do as soon as may be. Gwynne

or close up the business; and these provisions must be regarded. (*mm*)

§ 345. **Fiduciary Position of Surviving Partner.** — Until a settlement, the representatives of the deceased cannot claim or take any one chattel, or any portion of the merchandise. (*p*) The

(*mm*) Suydam *v.* Owen, 14 Gray, 195.

(*p*) A surviving partner has a right to collect all debts due to the firm, and to sell the property. His responsibility to the representatives of the deceased partner exists only after the partnership affairs are settled. Having the right to collect and dispose of the property, he has the power, for that purpose, of assigning any chose in action belonging to the estate. Pinckney *v.* Wallace, 1 Abb. Pr. 82. And see Roys *v.* Vilas, 18 Wis. 169.

Real estate, purchased by partners, for the partnership business and with the partnership funds, though conveyed to them by such a deed as, in case of other

v. Estes, 14 Lea, 662. This right to call for an account goes of course to the executor or administrator; the heir or next of kin cannot exercise it. In case, however, of refusal of the personal representative to exercise the right, by collusion or otherwise, the next of kin may file a bill, making the personal representative a party. Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076.

The representative of the deceased partner cannot sue on a partnership claim, even in equity, without alleging a wrongful refusal to sue on the part of the survivor. Kirby *v.* L. S. & M. S. R. R., 8 F. R. 462. But he may maintain a bill, alleging such wrongful refusal, and making the survivor a party. Kirby *v.* L. S. & M. S. R. R., 14 F. R. 261.

The duty of the surviving partner or partners to the estate of the deceased is to close up the business by paying the debts, and to render an account and pay over the share of the deceased as soon as may be. Clay *v.* Freeman, 118 U. S. 97; Sellers *v.* Shore, 89 Ga. 416, 15 S. E. 494; Oliver *v.* Forrester, 96 Ill. 315; Gable *v.* Williams, 59 Md. 46; Heath *v.* Waters, 40 Mich. 457. Since the duty of settling the business is upon the surviving partner, he cannot shift it to the estate. Thus where the surviving partner was ill, and the executors of the deceased settled up the business, they could get no compensation from the estate of the deceased; they must be paid out of the assets of the business, or by the survivor. Miller's Appeal, (Pa.) 7 Atl. 190. Where the survivor dies before the business is settled, the duty of closing it up passes to his personal representative. Dayton *v.* Bartlett, 38 Oh. St. 357.

We have already seen (*ante*, § 155) that a surviving partner has no right to compensation for his services in closing up the business. If, however, it is necessary for another to do the work, as in the two cases just cited, the stranger is of course entitled to compensation. We shall see later (*post*, § 415) that all the reasonable expenses of settling the business may be defrayed out of the assets.

All executory contracts of the firm which do not call for the personal service of the deceased continue in effect and bind the firm; the survivors must therefore fulfil such contracts, at the expense of the partnership and for its benefit. Davis *v.* Sowell, 77 Ala. 262; Ayres *v.* C. R. I. & P. R. R., 52 Ia. 478, 3 N. W. 522; Rust *v.* Chisolm, 57 Md. 376; Dowd *v.* Troup, 57 Miss. 204; King *v.* Leighton, 100 N. Y. 386, 3 N. E. 594; Tompkins *v.* Tompkins, 18 S. C. 1. If the contract called for personal service on the part of the deceased partner, the survivor of course cannot complete it. Oliver *v.* Forrester, 96 Ill. 315. The surviving partner, though he cannot continue in business on behalf of the old firm, may find it advisable not to stop business at once. If necessary for the proper closing up of the business the survivor may make purchases or even enter into contracts at the expense of the firm. Thus, he may in a proper case finish up unfinished work. Calvert *v.* Miller, 94 N. C. 600. Or he may buy merchandise if necessary for closing up the business. Oliver *v.* Forrester, 96 Ill. 315.

survivors are, from the death, trustees for all concerned in the partnership; for the representatives of the deceased, for the creditors of the firm, and for themselves. (q)[1] Their trust is to wind up the concern in the best manner for all interested, and, therefore, without unnecessary delay; and their powers are such as enable them most effectually to execute that trust. Nor do we know any difference, in this respect, as to the choses in possession and those in action.[2]

The surviving partners are held strictly as trustees; and their conduct, in discharging their trust, is carefully looked after by courts of equity. (r) Thus, like other trustees, they cannot sell the property of the firm and buy it themselves; nor, as the converse of this, can they buy from themselves property for the

parties, would make them tenants in common, is considered, in equity, as part of the partnership stock; and is to be applied, if necessary, towards payment of the partnership debts. Though such estate is considered at law as the several property of the partners, yet it is held subject to a trust arising by implication of law, by which it is liable to be sold, and the proceeds brought into the partnership fund, so far as is necessary to pay the debts of the firm; and neither the widow nor the heirs of a deceased partner can claim any beneficial interest in such estate, until the claims of the creditors of the firm are first satisfied. Burnside *v.* Merrick, 4 Met. 537. And upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner on settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death, until the surviving partner is so indemnified. Dyer *v.* Clark, 5 Met. 562. See *ante*, § 272, note.

(q) Case *v.* Abeel, 1 Paige, 393; Lake *v.* Gibson, 1 Eq. Ca. Ab. 290, affirmed in 3 P. Wms. 158; Jefferys *v.* Small, 1 Vern. 217; Elliot *v.* Brown, cited in Jackson *v.* Jackson, 9 Ves. 597; Lyster *v.* Dolland, 1 Ves. Jr. 434, 435, per Lord Thurlow; York *v.* Eaton, 2 Freem. 23; Booth *v.* Parks, 1 Molloy, 465; Sigourney *v.* Munn, 7 Conn. 11; [Farley *v.* Moog, 79 Ala. 148]. And see Egberts *v.* Wood, 3 Paige, 517; Ketchum *v.* Durkee, 1 Barb. Ch. 480; Whiteright *v.* Stimpson, 2 Barb. 379; Innes *v.* Lansing, 1 Paige, 583; Campbell *v.* Mullet, 2 Swanst. 574; West *v.* Skip, 1 Ves. 237, 445; *Ex parte* Ruffin, 6 Ves. 126, 128; Wood *v.* Dummer, 3 Mason, 312; Murry *v.* Murry, 5 Johns. Ch. 60; Taylor *v.* Fields, 4 Ves. 396; Young *v.* Keighley, 15 Ves. 557. And see Marlett *v.* Jackman, 3 Allen, 287.

(r) Phillips *v.* Ackerson, 2 Bro. Ch. 272; Hartz *v.* Schrader, 8 Ves. 317; Estwick *v.* Conningsby, 1 Vern. 118; Burden *v.* Burden, 1 Ves. & B. 170; Ames *v.* Downing, 1 Bradf. 321; Washburn *v.* Goodman, 17 Pick. 519; Case *v.* Abeel, 1 Paige, 398, per Walworth, Chancellor: "The surviving partner has the legal right to the partnership effects; but in equity he is considered merely as a trustee to pay the partnership debts and dispose of the effects of the concern for the benefit of himself and the estate of his deceased partner. He cannot, therefore, be permitted to make any gain or profit by the use of the partnership funds and effects for his own exclusive benefit." And see Ogden *v.* Astor, 4 Sandf. 311.

[1] Grim's Appeal, 105 Pa. 375.

[2] This language was approved in Davis *v.* Sowell, 77 Ala. 262.

firm.(s) Their trust being to wind up the concern, their powers are commensurate with the trust. Hence, they may collect, compromise, or otherwise arrange all the debts of the firm; and their receipts, payments, and doings generally, in this behalf, are valid, if honest, and within the fair scope and purpose of the trust. And if there be negligence, delay, misconduct, or gross mistake, equity will interfere, and give the proper relief.[1]

(s) But equity will not interfere and deprive the surviving partner of the right of closing up the concern, by appointing a receiver, if he is responsible and acts in good faith. So held where the survivor resided in England, but was engaged in closing up the affairs of the firm, by a competent agent, with all reasonable diligence. Evans *v.* Evans, 9 Paige, 178; Jacquin *v.* Buisson, 11 How. Pr. 385. Nor, in closing up the affairs of the firm, is there any such principle in equity, that surviving partners cannot become purchasers, from the representatives, of the share of deceased partner. Chambers *v.* Howell, 11 Beav. 6, 12 Jur. 905.

[1] The anomalous position of the surviving partner, who is in a fiduciary position, yet acts in his own right, has given rise to much conflict in the cases. A consideration of his precise position may perhaps be useful. The partnership no doubt comes to an end as a going concern upon the death of one partner; in the common phrase, it is dissolved. Yet it still remains as a body which owns property and owes debts. Its existence is not terminated until the business is wound up and final distribution made. This is perfectly well recognized in the business world, where the firm name is still used in liquidation, and the accounts are continued. By the death of a partner, however, the partnership can act only through the survivors; not through the representative of the deceased, since he was not a partner. The position of a survivor toward the assets and liabilities of the partnership is unchanged by his copartner's death. He continues to own the assets in trust for the firm; and the firm continues to be indebted to its creditors. The rights of the creditors in the partnership property are therefore unchanged. The surviving partners hold in trust, not for the creditors or the estate of the deceased, but for the firm. But as in the case of an active partnership, either the representative of the deceased partner or the firm creditors may enforce the obligation. It has been urged that the survivor takes the property in trust for the creditors, and that it must therefore be distributed on equitable principles; but that is evidently inexact. The property continues to belong to the firm, and firm creditors may sue the survivor and attach the firm property. Roach *v.* Brannon, 57 Miss. 490; Krueger *v.* Speith, 8 Mont. 482, 20 Pac. 664. The survivor has no more right after dissolution than before to transfer the property in payment of his individual debts; and the individual creditor who takes it with notice cannot hold it. Hill *v.* Draper, 54 Ark. 395, 15 S. W. 1025; Strauss *v.* Frederick, 91 N. C. 121. Since, however, he has the entire legal title, it might be held that a transferee without notice that it was partnership property would hold it; *sed* query. We have seen that an individual creditor of one partner could not hold partnership property given during the continuance of the partnership, though he had no notice that it was firm property. *Ante*, § 90.

This seems, however, to be opposed to the rule in cases of set-off. If the surviving partner is sued on a separate debt after the death of a copartner he may set off a firm credit. Slipper *v.* Stidstone, 1 Esp. 47, 5 T. R. 493; Johnson *v.* Kaiser, 40 N. J. L. 286; Nehrboss *v.* Bliss, 88 N. Y. 600 (*semble*). *Contra*, Weil *v.* Jones, 70 Mo. 560. If he is sued as surviving partner, he may set off an individual debt. Lewis *v.* Culbertson, 11 S. & R. 48. On the other hand, if he sues as surviving partner, the defendant may set off a debt due to him individually, Holbrook *v.* Lackey, 13 Met. 132 (but see Ross *v.* Pearson, 21 Ala. 473; Waln *v.* Hewes, 5 S. & R. 468); and if he sues on

It is said that the surviving partners are trustees, in part, for themselves. But while, as trustees they have all power and possession, they stand as *cestuis que trustent* on the same footing as the others; or, rather, must postpone themselves to the creditors of the firm; and only as to what is left after the creditors are paid do they come in on equal terms with the representatives of the deceased, and with each other. And, if there is not enough to pay the debts in full, then, all being equally liable, they must do nothing to disturb or prevent this equality. (*t*)

§ 346. **Survivors continuing Business.** — The survivors are not bound to continue the business at all; and would probably be permitted to wind it up quite abruptly, if they chose not to engage in new transactions for the firm, or even continue old ones, although the new or the old seemed to promise a much better winding up at the close. And, moreover, if the trustees choose to continue the property in trade, or to go on in business under the credit and risking the effects of the firm, not only will equity restrain them doing so, if injunction be desired by the representatives of the deceased, but if, by such new business, profit is made, the survivors will be bound to account for this profit as belonging to the firm (*u*)[1] And if no profit, or even a loss, is

(*t*) See cases cited in previous notes to this section. See Saving and Loan Society *v.* Gibb, 21 Cal. 595, limiting the liability of the surviving partner, 21 Cal. 496.

(*u*) Waring *v.* Cram, 1 Pars. Sel. Cas. 522; Washburn *v.* Goodman, 17 Pick. 519; Ogden *v.* Astor, 4 Sandf. 311; Booth *v.* Parks, 1 Molloy, 465; Crawshay *v.* Collins, 15 Ves. 218, 2 Russ. 325; Brown *v.* Litton, 1 P. Wms. 224; Hammond *v.* Douglas, 5 Ves. 539; Brown *v.* De Tastet, Jacob, 284, 292; Heathcote *v.* Hulme, 1 Jac. & W. 122.

an individual claim, the defendant may set off a debt due from him as surviving partner. French *v.* Andrade, 6 T. R. 582; Ferris *v.* Burrows, 34 Hun, 104.

Since the survivor is a trustee, not for the estate of the deceased but for the firm, he may buy the interest of the deceased from his representative. Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076; *supra*, note (*s*).

In Bush *v.* Clark, 127 Mass. 111, it was held that the interest of the survivor in the assets was such that his widow might have an allowance from them, though the partnership was insolvent. Query. The widow of the partner first deceased can certainly have no allowance; *ante*, § 252.

In disposing of the assets the survivor must be faithful to the interests of the firm. If he disposes of them fraudulently at too low a price, he is accountable to the representative of the deceased for the real value. Dewey *v.* Chapin, 156 Mass. 35, 30 N. E. 223. If there are two survivors who act fraudulently, as by dividing the assets among themselves, they are liable jointly. Bundy *v.* Youmans, 44 Mich. 376, 6 N. W. 851.

[1] Where the surviving partner makes use of firm assets in order to continue the business, whether with or without the consent of the representative of the deceased, he is of course accountable. If he converts the assets to his own use he is liable for their value at the time of the death of his copartner. Theller *v.* Such, 57 Cal. 447; Brown's Appeal, 89 Pa. 139. If the taking was at a subsequent time, the value of the

made, they must be charged with interest on the funds they use, and the whole loss will be theirs. (*v*) It seems, however, that, if the survivors carry the business on, and make a profit which is credited to the firm, they may be allowed some compensation for their services, unless the articles of agreement provide otherwise. (*w*) And a surviving partner may be allowed for his time and expenses, under especial circumstances justifying such a claim. (*ww*) The survivors do not, however, bear more than

(*v*) Simpson *v.* Feltz, 1 McCord Ch. 213; Goddard *v.* Bulow, 1 Nott & McC. 45; Honore *v.* Colmesnil, 7 Dana, 201; Moon *v.* Story, 8 Dana, 233; and cases in previous note.

(*w*) See Collyer on Part. § 328; and see Cook *v.* Collingridge, Jac. 607; Burden *v.* Burden, 1 Ves. & B. 170; Stocken *v.* Dawson, 6 Beav. 371. But see also, *contra*, Ames *v.* Downing, 1 Bradf. 321, in which the Surrogate says: "Nor can Mr. Hicks charge commissions, as surviving partner, for the collection of the debts. His legal duty was to collect the assets and wind up the business of the firm; a duty the law imposes on him as an incident to the contract of partnership, and for the performance of which no remuneration is promised or implied. Such a claim is new to me, and I am not aware that it is supported by precedent or authority." Beatty *v.* Wray, 19 Pa. 516; Brown *v.* McFarland's Ex. 41 Pa. 129.

(*ww*) Newell *v.* Humphrey, 37 Vt. 265.

assets is then to be taken. Klotz *v.* Macready, 39 La. Ann. 638, 2 So. 203; Parker *v.* Broadbent, 134 Pa. 322, 19 Atl. 631. He is therefore responsible for all losses. In Clay *v.* Field, 138 U. S. 464, however, it was held that under the exceptional circumstances this general rule would not apply. In that case the surviving partner of a southern plantation, before the war, continued to operate it as he thought best for the interests of all concerned. The slaves belonging to the plantation were freed by the war. It was held that the surviving partner was not responsible for their value. In accordance with the general rule, if a surviving partner occupies real estate belonging to the firm he must charge himself with the rent. Beale *v.* Beale, (Ill.) 2 N. E. 65.

For the corresponding rule in case of dissolution *inter vivos* see *ante*, § 286.

If the act of the partner in continuing the business was wrongful, the representative of the deceased would have the option of taking advantage of the dealings or repudiating them; that is, he might demand interest on the sum due, or a share of the profits. Theller *v.* Such, 57 Cal. 447; Brown's Appeal, 89 Pa. 139.

In arriving at a proper division of the profits, each case would seem to depend upon its own circumstances. "There is no inflexible rule governing all cases." Robinson *v.* Simmons, 146 Mass. 167, 15 N. E. 558. The true rule, in the absence of exceptional circumstances, is to deduct from the net profits such an amount as is attributable to the skill and services of the survivors in managing the business, and to divide the balance according to the actual shares of capital of the various partners at the time of the dissolution. Yates *v.* Finn, 13 Ch. D. 839; Robinson *v.* Simmons, 146 Mass. 167, 15 N. E. 558.

One surviving partner is not liable to the representative of the deceased because his surviving copartner continued the business, if he himself took no part in it. Matteson *v.* Nathanson, 38 Mich. 377.

Where the articles give a surviving partner the option of taking the whole business at a valuation, the profits belong to him exclusively and no interest in them to the estate from the time the option is exercised. Harbster's Appeal, 125 Pa. 1, 17 Atl. 204.

their share of losses resulting after the death of the deceased, from transactions entered upon before, and only carried to completion by the survivors.

§ 347. **Survivor whether Responsible for Value of Good-will.** — If the survivor or survivors carry on the business, they may sometimes realize great advantages and large profits from the fact that the business was so well established during the lifetime of the deceased. And then the question may come, whether the court will require them to make an allowance to the representatives of the deceased, for their profit. The question, in fact, amounts to this: Is the good-will of the concern so far partnership property that, if the survivors retain it, they must allow for it? There is but little adjudication on this subject; but that little leads to the conclusion, that the good-will goes to the survivors, without payment or allowance on their part. There are some difficulties, however, attending this view. The stock of goods, the lease, or the right or expectancy of remaining on the premises, all belong to the firm. If the merchandise, if sold in connection with the lease and right, will bring much more money than if sold otherwise, should it not be sold in this way; and if the survivors buy it, or take it, or keep it, should they not, in some form, allow for it the price it would bring if others bought it as they buy it? So much of the good-will — the meaning of which word is not very exactly defined — as attaches merely to the goods and the place, and the existing contracts, belongs, we should say, to all alike; but so much of it as is personal, and originates in the way of carrying on the business, and might go with the survivors wherever they engage in the same business, this belongs to them exclusively. (x)

(x) An examination of the authorities will show considerable conflict on these questions. Crawshay *v.* Collins, 15 Ves. 218, 227; Crutwell *v.* Lye, 17 Ves. 336; Farr *v.* Pearce, 3 Madd. 74; Lewis *v.* Langdon, 7 Sim. 421; Willett *v.* Blanford, 1 Hare, 253, 271. It was held in Williams *v.* Wilson, 4 Sandf. Ch. 379, that the good-will of a business, built up by a copartnership, is an important and valuable interest, which the law recognizes and will protect; and in Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, that, upon a dissolution, it must be sold, and that it does not survive. In Holden's Admr. *v.* McMakin, 1 Pars. Sel. Cas. 270, it was held, that the good-will (consisting of the subscription list, &c.) of a newspaper is partnership property; and when one of the partners dies, it does not survive to the surviving partner, but is to be sold, with the presses, types, and mechanical appliances of the establishment. In the case of Wedderburn *v.* Wedderburn, 22 Beav. 104, the Master of the Rolls, in delivering judgment, says: "The *good-will* of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity. Accordingly, in reported cases, Lord Eldon held, that a share of it properly and as of right belonged to the estate of the deceased partner. It does not survive to

§ 348. **Right of Survivors to take at Valuation.** — It has sometimes been supposed that the surviving partners have a right to

the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. *Good-will* manifestly forms a portion of the subject-matter which produces the profits (which constitutes partnership property); and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and, when that is silent, according to their shares in the concern. There is considerable difficulty in defining, accurately, what is included under this term *good-will:* it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case; but it is a matter distinctly appreciable, which may be preserved (at least to some extent), if the business be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged, and its assets got in and distributed. I am of opinion, then, that both on principle, on the authority of the decided cases, and on the ordinary rules of common sense, I must, whenever there is a reputation and connection in business, constituting *good-will,* treat that as part of the assets of the concern." See further, on this question, Hammond *v.* Douglas, 5 Ves. 539; Farr *v.* Pearce, 3 Madd. 74; Chippendale *v.* Tomlinson, Cooke's Bankr. L. 431; Silk *v.* Osborn, 1 Esp. 140; Coslake *v.* Till, 1 Russ. 376; Kennedy *v.* Lee, 3 Meriv. 441, 452; Webster *v.* Webster, 3 Swanst. 490, n.; Harrison *v.* Gardner, 2 Madd. 198; Butler *v.* Burleson, 16 Vt. 176. In Lewis *v.* Langdon, 7 Sim. 421, it was contended that the right to use the designation of a partnership ranges itself under the head of good-will, and that good-will survives, — the personal representatives of the deceased partner having nothing to do with it. The Vice-Chancellor, Sir L. Shadwell, in sustaining this position, said: "The question in this case depends on the right, in the surviving partner, to carry on the business under the name of the partnership. Lord Eldon, certainly, has expressed a doubt, in the case of Crawshay *v.* Collins (15 Ves. 227), upon what has been understood as the proposition laid down by Lord Rosslyn, in the case of Hammond *v.* Douglas (5 Ves. 539). It is true, that, the question might have been, to a certain degree, whether, having regard to what had taken place, the money should be considered to belong to one party rather than to another: and it is, also, observable, that Lord Eldon might have been throwing out his observations with reference to a supposed connection between the place where the business was carried on and the good-will. But it occurs to me, that, if the good-will is to be considered as a salable article which belongs to the partnership, then this consequence must follow; namely, that the surviving partner must be under an obligation to carry on the trade for some time after his partner's death, in order that the thing which is said to be salable may be preserved until it can be sold. If a partnership were carried on between A. and B., under the name of Smith & Co., and the surviving partner chose to discontinue the business, and to write to the customers, and say that his partner was dead, and that the business was at an end, — the effect would be, that that which is said to be salable would cease to exist. Now, what power is there in a court of equity to compel a partner to carry on a trade after the death of his copartner, merely that, at a future time, the good-will (as it is called) may be sold? It is plain that, unless there is such a power in this court, it must be in the discretion of the surviving partner to determine what shall be done with the good-will; and, if that is the case, it must be his property. I cannot but think, when two partners carry on a business in partnership together, under a given name, that, during the partnership, it is the joint right of them both to carry on business under that name; and that, upon the death of one of them, the right which they before had jointly becomes the separate right of the survivor." It was ac-

take all the effects and merchandise (after the debts are paid or secured) at a valuation. And, undoubtedly, there may be cases in which this would be a just and beneficial mode of settlement, and the court would therefore permit or order it. But it must be clear that they have no such right.[1] Indeed, the right on this point is on the other side; for it would seem, both from the reason of the case and on the authorities, that the representatives

cordingly held, that, as the plaintiff in this case had never abandoned the right which accrued to him on the death of his partner, an injunction would be granted to restrain the defendant, who was executor of the deceased partner, from using the partnership name in carrying on his business. See Wade *v.* Jenkins, 2 Giffard, 509. [The rule laid down in Wedderburn *v.* Wedderburn has finally prevailed, and if the surviving partner appropriates the good-will he must account for it; but the value of the good-will is materially affected by the fact that the surviving partner, like any one else, may start the same business in the same place, without appropriating the good-will if he refrains from securing any advantage from his direct connection with the old business. See the subject fully discussed and the authorities collected *ante*, § 181, note 1.]

[1] When the surviving partner continues the business, whether with or without the consent of the representative of the deceased, the equitable title of the old firm to its assets is not changed. The firm still owns them, and the creditors of the old firm can subject them to the payment of debts. The survivor will in the regular course of things sell part of the assets, buy other merchandise, and contract new debts. In selling the assets, the survivor acts within his rights; he passes title, and is personally accountable for the proceeds. A creditor of the old firm has no right therefore to the assets thus sold. And he can establish no claim to the merchandise bought by the survivor, since the latter bought it as an individual trader. The old creditors therefore are entitled to priority on all the assets of the old firm which remain *in specie;* the merchandise bought since dissolution is the separate property of the survivor. *Ex parte* Morley, L. R. 8 Ch. 1026; *Ex parte* Manchester Bank, 12 Ch. D. 917; *Ex parte* Butcher, 13 Ch. D. 465 (C. A.); Citizens' Ins. Co. *v.* Ligon, 59 Miss. 305; Tiemann *v.* Molliter, 71 Mo. 512; Allen *v.* Second Nat. Bank, 6 Lea, 558; Cowan *v.* Gill, 11 Lea, 674. If the partnership is continued after death (see *ante*, § 343, note 1) all creditors are firm creditors and all assets firm assets; and all the creditors, whether their debts accrued before or after the death of a partner, share alike. *In re* Simpson, L. R. 9 Ch. 572.

It is always to be borne in mind that creditors of the firm may be estopped from setting up their claims. They have the right to call for immediate payment out of the assets. If knowing of the dissolution they allow the assets to remain in the hands of the surviving partner in such a way as to lead the public to believe him the sole owner, and to credit him as such, they may be postponed. That is the case when the representative of the deceased partner allows the assets to be used for a long time in the business of the surviving partner. Hoyt *v.* Sprague, 103 U. S. 613. But it must be an unusual state of circumstances which would estop the creditors.

In Fitzpatrick *v.* Flannagan, 106 U. S. 648, it was held that the creditors of the old firm would be postponed to an assignee of the surviving partner in consideration of an individual debt, even as to assets remaining *in specie*, on the authority of Case *v.* Beauregard, 99 U. S. 119 (*ante*, § 248, note 1). That case has already been criticised, and the same objection would apply to the present case. An opposite conclusion was reached, in the case of an assignment by the surviving partner, in Allen *v.* Second Nat. Bank, 6 Lee, 558, *supra.*

of the deceased have a right to require a sale of the effects, as the only certain way of ascertaining their value and making a fair division. But this again, although a rule, cannot be deemed a universal rule; for equity may find in particular circumstances good reason for not decreeing a sale, although it must be admitted that it strongly inclines to that mode of settlement, as, on the whole, the fairest and the safest. (*y*) That the representatives of the deceased may have an account taken — or, rather, that their right in this respect is as complete as the right of the deceased while he lived and was a partner — seems to be certain. (*z*)

§ 349. **Survivorship in Actions.** — At law, the creditors of the firm must bring their actions against the surviving partners only; who, of course, charge what payments they are obliged to make, in account with the estate of the deceased. On the other hand, the survivors alone bring any action to collect a partnership debt, in their own names. At common law, the executor or administrator of the deceased cannot be joined; and the executors or administrators of the *last* survivor sue *alone*, without joining the representatives of the first or of any later deceased. (*a*)

(*y*) Crawshay *v.* Maule, 1 Swanst. 495, 523; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Cook *v.* Collingridge, Jac. 607; Simmons *v.* Leonard, 3 Hare, 581. In winding up the concerns of a partnership, after a dissolution, one partner cannot take the partnership stock at a valuation; but its value must be ascertained by the conversion of it into money. Sigourney *v.* Munn, 7 Conn. 11; Evans *v.* Evans, 9 Paige, 178; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Conwell *v.* Sandidge, 8 Dana, 278. See also, on this subject, Mifflin *v.* Smith, 17 S. & R. 165; Bradley *v.* Chamberlin, 16 Vt. 613; U. S. Bank *v.* Binney, 5 Mason, 185; Dickinson *v.* Bold, 3 Desaus. 501; Wilson *v.* Greenwood, 1 Swanst. 471; Leach *v.* Leach, 18 Pick. 75; Fereday *v.* Wightwick, 1 Tamlyn, 261; Rigden *v.* Pierce, 6 Madd. 353; Pierce *v.* Trigg, 10 Leigh, 406.

(*z*) Waring *v.* Cram, 1 Pars. Sel. Cas. 522; Washburn *v.* Goodman, 17 Pick. 519; Ogden *v.* Astor, 4 Sandf. 311. In Scott *v.* Milne, 5 Beav. 215, the court refused to open accounts, though of a general and summary nature, not containing the items, and which had been indorsed by a surviving partner to the representatives of a deceased partner, and had remained unquestioned for twenty-two years; but it decreed an account limited to the subsequent receipts of the surviving partner, which, it was admitted, had taken place. In Wedderburn *v.* Wedderburn, 22 Beav. 84, it is said, that the liability to account for profits derived from trade, carried on after the death of the testator, must depend, in the absence of contract, upon the nature of the trade, the mode of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner, and the conduct of the parties after his death. And see Stoughton *v.* Lynch, 1 Johns. Ch. 469; Brown *v.* Litton, 1 P. Wms. 140; Hammond *v.* Douglas, 5 Ves. 539; Brown *v.* Vidler, 15 Ves. 223; Brown *v.* De Tastet, Jac. 284; Fearns *v.* Young, 9 Ves. 549.

(*a*) Barney *v.* Smith, 4 H. & J. 485; Murray *v.* Mumford, 6 Cow. 441; Davis *v.* Church, 1 W. & S. 240; Clark *v.* House, 23 Me. 560; Peters *v.* Davis, 7 Mass. 257; Wallace *v.* Fitzsimmons, 1 Dall. 248; McCarty *v.* Nixon, 2 Dall. 65, note; Smyth *v.* Hawthorn, 3 Rawle, 355; Yale *v.* Eames, 1 Met. 487; Beach *v.* Hay-

§ 350. **Settlement of Estate of Deceased Partner.** — The estate of the partnership would be settled, in a case of dissolution by death, entirely on equitable principles; and no doubt it would be required that the claims of the several creditors and those of the joint creditors should be kept entirely distinct, each having its separate fund, and passing over to the other only in case of a surplus. Indeed, as we have already intimated, the decided tendency of common-law adjudication seems to be in that direction. (*b*) But the question seems not to be so fully settled by authority as we think it to be on principle. In the whole matter

ward, 10 Ohio, 455; Pfeffer *v.* Steiner, 27 Mich. 537. In Louisiana, the surviving partner does not possess the right, until he is authorized by the Court of Probate, to sue alone for, or to receive, partnership debts. Flower *v.* O'Connor, 7 La. 194; Connelly *v.* Cheevers, 16 La. 130; Hyde *v.* Brashear, 19 La. 402; Babcock *v.* Brashear, 19 La. 404. On actions against surviving partners, and actions against executors, see Richards *v.* Heather, 1 B. & Ald. 29; Given *v.* Albert, 1 W. & S. 333; Osgood *v.* Spenser, 2 H. & G. 133; Grace *v.* Shurter, 1 Wend. 148; Lang *v.* Keppell, 1 Binn. 123; Calder *v.* Rutherford, 1 Br. & B. 302, 7 Moore, 158. In Thorpe *v.* Jackson, 2 Younge & C. Exch. 553, it was held, that joint contractors, whether partners or not, are in equity jointly and severally liable; and, if one die, his assets are liable, but other contractors should be joined. See also Scholefield *v.* Heafield, 7 Sim. 667 [See *ante*, § 249.]

(*b*) Wilder *v.* Keeler, 3 Paige, 167; Morgan *v.* His Creditors, 20 Martin (La.) 599; M'Culloh *v.* Dashiell, 1 H. & G. 96; Payne *v.* Matthews, 6 Paige, 19; Hall *v.* Hall, 2 McCord Ch. 32; Bowden *v.* Schatzell, 1 Bail. Eq. 360; Cammack *v.* Johnson, 1 Green Ch. 163; *Ex parte* Moult, 1 Deac. & Ch. 44, 73, 1 Mont. 292. A deceased partner's estate, after payment of his separate debts, is applied in payment of such partnership debts as remain unsatisfied after applying the whole partnership assets in liquidation thereof; and, if his personal estate is insufficient, the real estate of the deceased partner is to taken. Addis *v.* Knight, 2 Meriv. 117, 119. As to the power of survivors to make a new contract to keep alive a debt against the estate of a deceased partner, see Braithwaite *v.* Britain, 1 Keen, 221. By partnership articles, D. was to be a partner with A. and B. in profits, but not in the capital stock; and he was not required to find any capital. D.'s partnership was to continue for twelve years, at the expiration of which term his interest in the concern was to cease. If D. died during such term, his representatives were to receive a proportionate part of his share of the profits of the current half-year, for the period up to his decease, to be ascertained according to the average of the last two preceding half-yearly stock-takings. D. died; after which the business was carried on by A. and B. until A.'s death, and then by B. alone. A creditor of the firm, in respect of a debt contracted while the firm consisted of A., B., and D., claimed to have the whole of B.'s estate applied in payment of all the creditors of A., B., and D., without regard to whether their debts were contracted before or after the death of D., or before or after the death of A. There were in existence specific assets which had belonged to the firm while it consisted of A., B., and D. It was held, that under the partnership articles, D.'s executors had a right to have the debts existing at D.'s death paid out of the then existing assets; that the assets then on hand, and now existing *in specie*, must therefore be applied in payment of the creditors of the original firm of A., B., and D.; and that, therefore, such creditors could not take B.'s separate assets until his separate creditors had been paid in full. *Ex parte* Dear, *In re* White, 1 Ch. D. 514.

of the settlement of such an estate, there are yet questions which cannot be considered as positively determined. Thus, after some conflict and uncertainty, it seems now to be settled in England, that, on the death of a partner, a creditor of the firm may proceed at once in equity against the estate of the deceased, whether the firm or the surviving partners be solvent or otherwise; the court requiring, however, that the surviving partners should be made parties, because they are interested in the account. (*c*) It may be said, however, that if the firm, or the surviving partner, is solvent, nothing is gained by this: the estate which pays the debt charges it in account with the firm, or against the surviving partner; and there seems to be little more reason why a joint creditor should have this power after the death of a partner than during his life. (*d*) It is derived, however, from the principle, that in equity all the contracts of a partnership are considered to be joint and several. In this country this rule has been a good deal questioned; and, although some acknowledged principles would lead to it, it may perhaps be doubted whether the result of a final adjudication of equity on this point will not protect the estate of the deceased against such process, unless special circumstances lead to the conclusion that justice to the creditor, in that particular case, requires it.[1]

The authorities lead also very strongly to the rule, that where there is no joint fund, and no surviving partner who is solvent, the joint creditor shall have the benefit of the separate estate of a deceased partner, *pari passu*, with the separate creditors of

(*c*) Wilkinson *v.* Henderson, 1 Mylne & K. 582; Devaynes *v.* Noble, 2 Russ. & M. 495; Thorpe *v.* Jackson, 2 Y. & C. 553; Sleech's Case, 1 Meriv. 539; Braithwaite *v.* Britain, 1 Keen, 219. See Kimball *v.* Whitney, 15 Ind. 280.

(*d*) See Ridgway *v.* Clare, 19 Beav. 111.

[1] In accordance with the English doctrine, it is held in some jurisdictions in this country that on the death of a partner a creditor of the firm may at once proceed in equity against the estate. Nelson *v.* Hill, 5 How. 127; Fiske *v.* Gould, 12 F. R. 372; Silverman *v.* Chase, 90 Ill. 37; Ralston *v.* Moore, 105 Ind. 243 (by statute); Rice, appellant, 7 All. 112 (by statute); Irby *v.* Graham, 46 Miss. 425 (*semble*); Blair *v.* Wood, 108 Pa. 278 (by statute); Higgins *v.* Rector, 47 Tex. 361. In other jurisdictions it is held that the firm creditor cannot proceed against the deceased unless the firm and the survivor are insolvent. Troy Iron & Nail Factory *v.* Winslow, 11 Blatch. 513; Alsop *v.* Mather, 8 Conn. 584; Filley *v.* Phelps, 18 Conn. 294 (*semble*); Pullen *v.* Whitfield, 55 Ga. 174; Anderson *v.* Pollard, 62 Ga. 46; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Pope *v.* Cole, 55 N. Y. 124; First Nat. Bank *v.* Morgan, 73 N. Y. 593; Horsey *v.* Heath, 5 Ohio, 353; Pearce *v.* Cooke, 13 R. I. 184; Sherman *v.* Kreul, 42 Wis. 33. The partnership creditors may of course prove their claims against the estate, and secure payment of their claims, if necessary, out of any balance left after paying the separate creditors of the deceased. Greene *v.* Butterworth, 45 N. J. Eq. 738, 17 Atl. 949.

that partner. (*e*) We see no more justice in this rule, and no more reason for it, than for saying that the separate creditor, if there be no separate estate, may come in upon the joint property equally with the joint creditors; and this has never been permitted. And the strong disapproval of the rule sometimes met with, (*f*) connected with the general tendency of the law at this day to complete its recognition of a partnership as a body by itself, with its own means appropriated to its own debts, lead us to doubt of the propriety and of the permanency of the rule.

§ 351. **Notice of Death.** — The estate of a deceased partner may be discharged by payment of the debt, involving, however, the question of appropriation of payment or, by a transfer of the account, involving the question of novation, much in the same way in which a retiring partner may be discharged; and the view taken of these questions, when considering the discharge of a retiring partner, leads to the conclusion, that notice of a dissolution by death is not necessary to prevent the estate of the deceased from becoming liable for new debts of any kind.

The Supreme Court of Massachusetts has considered very fully the question, whether the surviving partners are bound to give notice of the death of a partner, and a dissolution by his death. It is decided, for reasons which seem unanswerable, that there is no such necessity to avoid a liability caused by the subsequent misuse of the copartnership name by one of the firm. The court say, Bigelow, C. J., giving the opinion, that, by a well-settled rule, no notice need be given by the representatives of the deceased, to avoid liability on future contracts; and they see no reason for imposing a duty of giving notice of the dissolution of the firm on surviving partners. (*g*)

(*e*) Sparhawk *v.* Russell, 10 Met. 305; Emanuel *v.* Bird, 19 Ala. 596. And see Smith *v.* Mallory, 24 Ala. 628; Wilby *v.* Phinney, 15 Mass. 116; Busby *v.* Chenault, 13 B. Mon. 554; Bell *v.* Newman, 5 S. & R. 78.

(*f*) M'Culloh *v.* Dashiell, 1 H. & G. 96; Irby *v.* Graham, 46 Miss. 425. See also Pierce *v.* Jackson, 6 Mass. 242; Eddie *v.* Davidson, 1 Doug. 650; Field *v.* Clark, 4 Ves. 396; Fisk *v.* Herrick, 6 Mass. 271; Allen *v.* Wells, 22 Pick. 450; Melville *v.* Brown, 15 Mass. 82; Tappan *v.* Blaisdell, 5 N. H. 190. But see Lord *v.* Baldwin, 6 Pick. 348; French *v.* Chase, 6 Me. 166; Church *v.* Knox, 2 Conn. 514; Barber *v.* Hartford Bank, 9 Conn. 407; Donner *v.* Stauffer, 1 Pen. & W. 198. That the separate property of each member of the firm is liable at law to be taken in execution by any creditor of the firm, see Allen *v.* Wells, *ubi sup.*; Newman *v.* Bagley, 16 Pick. 570; M'Culloh *v.* Dashiell, 1 H. & G. 96; Tucker *v.* Oxley, 5 Cranch, 35. See this question fully discussed in Silk *v.* Prime, 2 Lead. Cas. in Eq. 313, Hare & Wallace's notes.

(*g*) Marlett *v.* Jackman, 3 Allen, 287. And see Webster *v.* Webster, 3 Swanst. 490, n.; Vulliamy *v.* Noble, 3 Meriv. 614; Washburn *v.* Goodman, 17 Pick. 519. An exception as to the necessity of such a notice has been made, when the surviving partners, or one of them, are executors of

The surviving partners, if they hold claims or a balance against the deceased partners, are treated like other creditors. And if as creditors they have any advantage, — as, for example, by being specialty creditors, — this advantage is preserved to them. (*h*) This advantage is greater in England than here. There, an administrator was not permitted to retain his own simple contract debts, against a surviving partner, with whom the deceased partner had covenanted to pay certain debts, and had not paid them.

§ 352. **Survivor made Executor of Deceased.** — If a deceased partner has made his partner his executor, certain consequences still result in England which would not take place here; as the rules that an executor should have all property undisposed of, and that the appointment of him as executor discharges any debt due from him, which have lost much of their force and influence there, have none whatever here. It is very common in this country for a partner to appoint a copartner his executor: this adds to his power as surviving partner that of executor; but the combination of these two characters gives him no new rights or powers in either of them. It has been said that the duties of these two characters are inconsistent, and, therefore, the practice objectionable; but they are not found to be so in fact in this country. Doubtless, the executor would be watched very carefully, to guard against his using his executorship as a means of securing undue personal advantage to himself as a partner. The watchfulness of a court of equity on this point is well illustrated by an English case, in which the court opened accounts and arrangements between executor partners and legatees, after they had been confirmed by being acted upon for some thirty years. (*i*)

How the acts of a person who is both executor and surviving partner are distinguished, so that what he does in one capacity shall not affect rights or interests in his hands in another, may be illustrated by the rule, that payments by a firm, after the death of a partner, even under its old name, where one of the firm is executor of the deceased, shall not be considered pay-

the deceased partner: for then, in order to exonerate his estate from future liability, it is said that due notice ought to be given of his death, to the creditors of the firm; because, in the absence of such notice, the executor partner, in his character of personal representative of the deceased, has power to bind his estate. Vulliamy *v.* Noble, 3 Meriv. 714. See also, on the general question, Murray *v.* Mumford, 6 Cow. 441; Canfield *v.* Hard, 6 Conn. 184; Burwell *v.* Mandeville, 2 How. 560; Downs *v.* Collins, 6 Hare, 418.

(*h*) Musson *v.* May, 3 Ves. & B. 194; Kerr *v.* Hawthorne, 4 Yeates, 170. See Newell *v.* Humphrey, 37 Vt. 265.

(*i*) Wedderburn *v.* Wedderburn, 2 Keen, 722, 4 Mylne & Cr. 41.

ments by that partner as executor of the deceased, if such payments would have the effect of preventing the operation of the statute of limitations as against debts due from his estate. (*j*)

§ 353. **Power of Appointment given by the Articles.** — We have already remarked that the articles forming the partnership, or an agreement between the partners subsequent to the articles, may provide either that certain representatives of a partner shall, at his death, become partners, or a partner in his place, or that the partner may make provision to this effect in his will. If no such agreement is made between the partners, no one of them has any power, in this respect, excepting over his own estate. He may leave this to whom he will, and on what condition he will. And if he says therein that such a person, whether devisee or legatee, shall become a partner in the firm, the person so pointed out must submit to the conditions, and offer himself as partner. This is equally true whether the deceased has a power of appointment or not; for it is merely an application of the rule that he who would take the benefit of a testamentary provision must comply with its requirements. And doubtless, if, by an agreement, a partner bound his estate to the continuance of a partnership, it would be regarded by the law as so bound, unless the provision were obviously foolish or inequitable; and all the rights of the representatives would be subject to this obligation. (*k*)

(*j*) Way *v.* Bassett, 5 Hare, 55. In this case, A. deposited moneys with B., C., & D., who were bankers in partnership; and received from them notes, in which they promised to pay him the amount three months after sight, with interest. B. died in March, 1837, having appointed C. and another his executors. C. & D. continued the banking business in the same name until 1842; and interest was regularly paid on the notes by the firm until that time, the payment being indorsed upon the notes, and signed by one of the partners or their clerk. In December, 1843, the executors of A. filed their bill against the executors of B., and the devisees under his will, for payment of the amount of the notes out of the personal or real estate of B. It was held that the acts of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of the statute of limitations, as against the real or personal estate of the deceased partner; and also, that acts done by one of the surviving partners, who was executor of the deceased partner, and which the surviving partners were in that character bound to do, cannot *prima facie* be considered to have been done in the character of executor. For authority that the acts of the surviving or continuing partners cannot keep alive a debt or obligation, or otherwise augment or prolong any liability of the estate of the deceased partner, see Atkins *v.* Tredgold, 2 B. & C. 23; Slater *v.* Lawson, 1 B. & Ad. 396; Ault *v.* Goodrich, 4 Russ. 431; Scholey *v.* Walton, 12 M. & W. 510; Barker *v.* Buttress, 7 Beav. 134; *Ex parte* Woodward, 3 Mont. & A. 232. A surviving partner, being the executor of his deceased partner, is not entitled to an allowance for carrying on the business, after his partner's decease, for the benefit of the estate. Burden *v.* Burden, 1 Ves. & B. 170; Stocken *v.* Dawson, 6 Beav. 371.

(*k*) Pemberton *v.* Oakes, 4 Russ. 154; Ponton *v.* Dunn, 1 Russ. & M. 402; Crawshay *v.* Maule, 1 Swanst. 512.

Whether, however, this continuance be provided for by the articles, irrespective of the will of one who should die, or by the will of a deceased partner under the authority of the articles, we have already stated our opinion that it is called a continuance of the partnership inaccurately; it being, in fact and in law, only a provision for the formation of a new partnership which shall stand in a certain relation to the old one.

§ 354. **Appointee becomes Partner only by his Consent.** — It is admitted that any such appointment or direction by will shall be construed very liberally towards the appointee, whether executor or not, so as to give him an election whether he will become a partner or not. (*l*) But it must be obvious that if there be no room for this construction, — that is, if the requirement be in terms the most peremptory and absolute, — it cannot, of itself, make the appointee a partner. He does not become one until he assumes that relation by his own act. The deceased may have bound his estate effectually; but, if the appointee chooses to renounce the estate, he is certainly no partner. And this proves that it is not a mere continuance of the same partnership with a new member. So it is said, that, if such appointees, executors, or others are silent, even if the right of choice be given to the executors, their consent will be assumed, and they will be regarded as partners. (*m*) But, in the first place, their consent would hardly be assumed from their mere silence; and not unless they acted in some way to show that they were partners, or unless the being partners was productive of some direct benefit to them, as by a legacy which they indicated their purpose of taking. And, in the next place, the very presumption of their consent shows that it was necessary, and was really that which made them partners, and made the new partnership. It is even held as a rule in equity, that such appointee has not only the right of election, but a right to inspect the books and accounts of the partnership, that he may know how to exercise this right. (*n*)

(*l*) Pigott *v.* Bagley, McClel. & Y. 569; Wainwright *v.* Waterman, 1 Ves. 311; Crawshay *v.* Maule, 1 Swanst. 512, per Lord Eldon; Kershaw *v.* Matthews, 2 Russ. 62.

(*m*) Morris *v.* Harrison, Colles, P. C. 157.

(*n*) By partnership articles, it was stipulated, that the partnership should continue for nineteen years; and that, if either of the partners should die, during the term, the widow, or other legal personal representative of the partner so dying, should be let into the partnership, and become a partner therein, in the same manner, and upon the same terms and conditions. It was held that this was not an absolute or imperative obligation on the widow or personal representative to become a partner; but only an option so to do, with a stipulation by the surviving partner to admit them. It was also held that the widow, or personal representative, was entitled to a reasonable time to inspect and examine

Whether an appointee becomes partner on his own account, or an executor or trustee becomes partner for the benefit of the representatives of the deceased, or there is no new member, although the estate of the deceased, or some part of it, remains in the partnership and in the business, for the benefit of his representatives or appointees, — we consider that the former partnership came to its end by his death, and that the firm now going on, however composed as to persons or estate or business, is a new one. Nor is it in law any less a new one because it stands in very close relations with the former, and may be considered its immediate successor or substitute or representative. (*o*)

§ 355. **Estate Liable only so far as Expressly Provided.** — Whatever powers of this kind are given to an executor, either to become partner, or, being partner, to carry on the business for the benefit of the representatives of the deceased, or to leave the estate of the deceased in the partnership and in the business, on any terms and for any purpose, these powers would probably be strictly construed; at least, they would never be enlarged by implication. Thus, it is clear that the deceased may limit the amount or proportion of his estate which shall remain in the partnership or go into it, at his own pleasure; and the executors or appointees can no more enlarge this than they can violate any other of his directions. Nor will such a disposition or limitation in any way affect the rights of the creditors of the partnership. But it seems to be regarded in equity somewhat as a proposition made to them, to which they may assent if they please. They have the power of having all his estate brought forth and made answerable for the debts. But they need not execute this power, unless they see fit to do so; and delay and silence on their part will be considered as a confirmation of the provision of a deceased partner. (*p*)

So, the creditors of the new partnership have no claim whatever upon, and no interest in, the general assets of the deceased, or any part of them, but that which he expressly places in the new partnership; which is also another illustration of the prin-

the partnership accounts, but not to have the accounts taken, before they elected whether they would become partners. The usual case of election is, where a person has a right, independent of a testator, and the testator gives such person some other right or benefit, on condition of the former being relinquished, as the dower of a widow; and, in such case, the party is entitled to know the precise value of the benefit intended, before election. Pigott *v.* Bagley, 1 McClel. & Y. 569.

(*o*) See cases cited *infra*.

(*p*) Downs *v.* Collins, 6 Hare, 418; *Ex parte* Garland, 10 Ves. 119. On the question of silence being a confirmation of the provision, see Morris *v.* Harrison, Colles, P. C. 157.

ciple, that this continued partnership, so called, is a new one.[1] If a part of the property goes into the new partnership, but no person is added to it, the creditors of the new firm have only the security of this part. (q)

§ 356. **Trustee or Other Appointee may be liable Personally.** — If a person goes with the business and takes part in it, either as executor, or as trustee, the creditors generally have his personal liability as partner, in the same way as that of the other partners; for it seems to be laid down as a positive rule, that an executor who carries on the business of his testator pledges his own respon-

(q) Burwell *v.* Mandeville, 2 How. 560; Cutbush *v.* Cutbush, 1 Beav. 184; Williamson *v* Naylor, 3 Y. & C. 208; *Ex parte* Garland, 10 Ves. 110, by Lord Eldon, that under the bankruptcy of an executor and trustee directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable. The Lord Chancellor says: "My opinion upon this case is, that it is impossible to hold that the trade is to be carried on, perhaps for a century; and at the end of that time the creditors, dealing with that trade, are, merely because it is directed by the will to be carried on, to pursue the general assets, distributed perhaps to fifty families." See also Pitkin *v.* Pitkin, 7 Conn. 307; *Ex parte* Richardson, 3 Madd. 138, 157; Thompson *v.* Andrews, 1 Mylne & K. 116.

[1] Where the articles provide or the deceased partner directed that his interest should remain in the business, that does not, without a special provision to that effect, render the general estate of the deceased liable for the debts later contracted. An estate cannot be a partner. Subsequent creditors have the personal security of such persons as actually take part in the business, and may levy upon all the property of the partnership; the interest of the deceased in the property being, of course, postponed to the claim of the creditors. But the risk of the estate is confined to the money actually invested in the business at the time of the death. Smith *v.* Ayer, 101 U. S. 320; Cook *v.* Rogers, 3 F. R. 69; Vincent *v.* Martin, 79 Ala. 540; Brasfield *v.* French, 59 Miss. 632; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295; Nat. Bank of Newburgh *v.* Bigler, 83 N. Y. 51; Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160; Lucht *v.* Behrens, 28 Oh. St. 231. And the estate is not even liable for dividends of profits received by it if they were *bona fide* ordered by the partners, and did not when made diminish the capital or hinder the payment of debts. Jones *v.* Walker, 103 U. S. 444.

The curious analogy between the position of the estate in this case and that of a special partner under limited partnership acts is to be noted. It is perhaps worthy of consideration whether some method might not be found, apart from the statute, of investing money in a partnership without becoming liable for more than the amount invested. Compare, for example, cases of loan to a partnership to be compensated by a share in the profits, *ante*, § 70.

The deceased can, it would seem, render his general estate liable by explicit directions to that effect; but it must appear unequivocally that he so intended. Brasfield *v.* French, 59 Miss. 632; Exchange Bank *v.* Tracy, 77 Mo. 594; Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705. But see Blodgett *v.* American Nat. Bank, 49 Conn. 1. Though a signature in the firm name by the surviving partner would not bind the estate, a transfer of property by the survivor, such as an assignment for the benefit of creditors, passes, of course, all interest of the estate in the property so transferred. Shaw, Appellant, 81 Me. 207, 16 Atl. 662; Bell *v.* Hepworth, 134 N. Y. 442, 31 N. E. 918.

sibility to the creditors; and this although it is certain that he continues the business in no degree for his own benefit, but for that of the infant children of the deceased.(*r*)[1] In this country, a person may be appointed by equity to carry on a business for the benefit of an infant partner; (*s*) and, doubtless, an English court of equity has this power; and, although we know of no case in which it has been exercised, there are cases in which reference is made to this power. (*t*) But we do not think that a person so appointed by the court would be held, unless a liberal compensation were made to him, subject to the stringent liabilities which, according to the authorities, would seem to attach to an executor

(*r*) Wightman *v.* Townroe, 1 M. & S. 412, per Bayley, J. . "The executors in this case are mere volunteers. At law, they became the legal proprietors in respect of everything belonging to the trade; and consequently are liable for the legal debts." Lord Ellenborough, C. J.: "The fund subsisting at the death of the testator, under a due administration of the will, should have been disposed of by the executors, and converted into money, and distributed as assets. Instead of this, it is embarked *de novo* in the trade in the purchase of other barley, and a variety of other contracts, to which the infant is not privy, nor bound by them, but may renounce when she comes of age as *damnosa hæreditas.* If, then, the infant has such an option, who but the executors can be liable?" See the remarks of Lord Mansfield in Barker *v.* Parker, 1 T. R. 295. See also *Ex parte* Richardson, 1 Buck. 209; Owen *v.* Body, 5 A. & E. 28; Alsop *v.* Mather, 8 Conn. 587. If an executor, without any authority from the will, take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy; the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests; and with respect to such of the assets as can be specifically distinguished to be a part of the testator's estate, they will not pass to the assignees; the executor holding them *alieno jure,* they will not be liable to his bankruptcy. *Ex parte* Garland, 10 Ves. 110; Toller on Executors, 487; *Ex parte* Richardson, 1 Buck, 202.

(*s*) Thompson *v.* Brown, 4 Johns. Ch. 619; Powell *v.* North, 3 Ind. 392.

(*t*) In Sayer *v.* Bennett, cited 1 Montagu on Partnership, Appendix, 20, 1 Cox, 107, Lord Kenyon, in a case where there was an application for the exercise of this power by chancery for the benefit of a lunatic, observed: "It is said that equity should appoint some person to carry on the business for the benefit of the lunatic, *as they would have done for an infant;* but I say, God forbid." And in Barker *v.* Parker, 1 T. R. 295, Lord Mansfield said: "If executors carry on a trade, they must do it as individuals, for their own advantage. I remember many instances of trade being carried on under the direction of the court of chancery."

[1] Where the executor, according to directions in the articles or otherwise, takes part in the business he becomes personally liable as a partner. *Ante,* § 74; Mattison *v.* Farnham, 44 Minn. 95, 46 N. W. 347 (*semble*); Citizens' Ins. Co. *v.* Ligon, 59 Miss. 305; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295; Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705. But the executor is not liable personally if he merely leaves the share of the deceased in the business, without taking part in it. Avery *v.* Myers, 60 Miss. 367; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295. If the executor becomes a partner it is in a new firm, and he is not liable personally for an old debt. Mattison *v.* Farnham, 44 Minn. 95, 46 N. W. 347.

who carries on the business in this way. It would seem that administrators are not chargeable personally with a loss to the assets of their intestate, which were in good faith and for good reason left for a time in the business, unless some negligence or other fault imputable to them can be considered as a cause of the loss. (*u*)

(*u*) In Rowth *v.* Howell, 3 Ves. 565, it was held, that executors were not liable for a loss by the insolvency of a banker whom the testator had trusted, and with whom they suffered stock, deposited by the testator, to remain although they were directed to pay debts, and lay out the residue in mortgages with all convenient speed. They had not been guilty of laches. In Thompson *v.* Brown, 4 Johns. Ch. 628, the distinction which exists in the two classes of cases is very clearly stated by Chancellor Kent. See also Knight *v.* The Earl of Plymouth, 3 Atk. 480, Dickens, 120 ; Wilkinson *v.* Stafford, 1 Ves. Jr. 41 ; Vez *v.* Emery, 5 Ves. 144. To authorize executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose. Kirkman *v.* Booth, 11 Beav. 273, 280. By partnership articles, testator's capital was to remain in the concern for eighteen months after his death. By his will, he conveyed his property to his executors, in trust to pay the rent, issues, and profits, dividends, interests, and income of his real and personal estate to his wife, for life. It was held that the wife was entitled to the profits of the capital in the partnership until it was separated. Skirving *v.* Williams, 24 Beav. 275.

CHAPTER XIV.

OF DISSOLUTION BY DECREE.

§ 357. **Method of Dissolving Partnership.** — The courts of common law have no power whatever of decreeing or causing a dissolution of a partnership. (*a*) In some cases, in which equity would make such a decree, as where a partnership was formed through fraud, courts of law might apply the principle that a contract so vitiated never had force, and on this ground declare it null, and avoid the partnership. But courts of equity have full power over this matter; and upon a bill filed by any partner, alleging a sufficient cause, and upon proper evidence, if the facts are not admitted, the court decrees a dissolution of the partnership. (*b*) A decree or judgment for winding up the affairs of a partnership may divide the stock and property, after the debts are paid, among the partners, or order it sold, and divide the proceeds in a certain way, which is the more common case.(*bb*) Whichever is done, the decree should, it is said, not be in the alternative, but positive and definite. (*bbb*)

The decree may declare that the partnership never existed.[1] If fraud, or oppressive or wrongful or illegal purpose, or extreme and certain folly, in the inception and formation of the contract, be alleged and proved, the court would declare that the original formation of a partnership so tainted had no validity in law, and that the partnership never existed. (*c*) This procedure is, how-

(*a*) Story on Part. § 284; 1 Story on Eq. Jur. § 673; Stone *v.* Fouse, 3 Cal. 294; Nugent *v.* Locke, 4 Cal. 320; Wilson *v.* Lassen, 5 Cal. 116; Barnstead *v.* Empire Mining Co., 5 Cal. 299.

(*b*) See cases cited in the following notes. And see Baxter *v.* West, 1 Drewry & Sm. 173; and Dumont *v.* Rueppreeht, 38 Ala. 175; Meaher *v.* Cox, 37 Ala. 201.

(*bb*) Watney *v.* Wells, L. R. 2 Ch. 250.

(*bbb*) Harper *v.* Lamping, 33 Cal. 641.

(*c*) Lord Eldon, in Tattershall *v.* Groote, 2 B. & P. 135, said: "Courts of equity interfere in cases where fraud has been practised, and order the consideration to be returned; and then they treat the articles as a nullity, in conse-

[1] Such a decree will not be entered for misconduct of a partner merely, in the absence of fraud. Oteri *v.* Scalzo, 145 U. S. 578.

ever, rare. The far more common way is to decree a dissolution of the partnership for causes occurring after its formation.[1]

§ 358. **Dissolution for Misconduct of Partner.** — Causes for dissolution are divisible into two classes: those which imply misconduct on the part of one or more partners, and those which do not. Of the first it is always said, that any misconduct of any kind, provided it be such in its character and intensity as to expose the other partners to important injury of any kind, will be considered a sufficient ground for dissolution. (*d*) But it is also frequently remarked, that this is a grave exercise of power, and will not be made for slight reasons. (*e*) Bad temper, overbearing and op-

quence of the fraud." Howell *v.* Harvey, 5 Ark. 278. "The jurisdiction of a court of equity, in cases of copartnership, flowing from the peculiar trusts and duties growing out of that connection, is of the most extensive and beneficial character. It often declares partnerships utterly void, in cases of fraud, imposition, and oppression in the original agreement." And see *Ex parte* Broome, 1 Rose, 69; Hamilton *v.* Stokes, 4 Price, 161, Daniel, 20; Oldaker *v.* Lavender, 6 Sim, 239; Green *v.* Barrett, 1 Sim. 45; Jones *v.* Yates, 9 B. & C. 532; Colt *v.* Wollaston, 2 P. Wms. 154; Fogg & Vanderslice *v.* Johnston, 27 Ala. 432. Fraud of one partner against the firm is a good ground for dissolution before the expiration of the term. Cottle *v.* Leitch, 35 Cal. 434.

(*d*) In Howell *v.* Harvey, 5 Ark. 278, the court said: "Habitual drunkenness, great extravagance, or unwarrantable negligence in conducting the business of the partnership, justifies a dissolution; but then it must be a strong and clear case of positive or meditated abuse, to authorize such a decree. For minor misconduct and grievances, if they require redress, the court will interfere by way of injunction to prevent the mischief." Baring *v.* Dix, 1 Cox, 213; Goodman *v.* Whitcomb, 1 Jac. & W. 574 note; Waters *v.* Taylor, 2 Ves. & B. 299; Loscombe *v.* Russell, 4 Sim. 8; Gratz *v.* Bayard, 11 S. & R. 41, 48; Littlewood *v.* Caldwell, 11 Price, 97, 99; Marshall *v.* Coleman, 2 Jac. & W. 266; Chapman *v.* Beach, 1 Jac. & W. 594; Norway *v.* Rowe, 19 Ves. 148. But misconduct will not justify a partner in treating the partnership as ended without a decree and proceeding to take exclusive control of the partnership affairs. Ambler *v.* Whipple, 20 Wall. 546.

(*e*) Acting on this principle, it was held, where articles of partnership provided, that, if either of the partners should give guaranties without consent, the other might dissolve on giving notice, and one of the partners, in the course of eight years, gave a guaranty for 52*l*., and the other gave notice to dissolve, that this alone was not, in equity, a sufficient ground for a dissolution. Anderson *v.* Anderson, 25 Beav. 190. And in Wray *v.* Hutchinson, 2 Mylne & K. 238, the Master of the Rolls observed, that, upon the opening of the pleadings, he had doubted whether the plaintiff had stated a case which entitled him to a dissolution of the partnership; for although a partnership would be dissolved in equity, if a defendant had substantially failed in the performance of his part of the agreement, yet it was not the office of a court of equity to enter into a consideration of mere partnership squabbles. And see Lord Eldon, in Goodman *v.* Whitcomb, 1 Jac. & W. 592; Henn *v.* Walsh, 2 Edw. Ch. 129. But only little more is needed; and dissolution will be granted, where dissension prevents all hope of advantage. Bishop *v.* Breckles, 1 Hoff. Ch. 534; Seighortner *v.* Weissenborn, 20 N. J. Eq.

[1] Fraud in inducing one to enter into a partnership, is a ground for dissolution. Rosenstein *v.* Burns, 41 F. R. 841.

pressive conduct, quarrelling, indolence, and inattention, intemperance, or bad habits, and disgraceful conduct, wild speculation, gross extravagance, absenting himself from his business, or entering into other business engagements inconsistent with his duty to his partners, or any conduct which brings disgrace upon the firm or impairs their credit, (*f*) — are all causes which may be sufficient, if their *degree* be sufficient; and otherwise not. For one instance of the kind, or two, or three, the court may not interfere, but will leave the parties to themselves, and hope for their reform and reconciliation. Nor will the decree of dissolution be pronounced merely because one of these, or similar modes of misconduct, goes so far as to expose the other partners to some inconvenience, or to bring discomfort upon them. And if the mischief complained of is specific, and a habit, and persisted in, the court

172. A decree for a dissolution will be warranted, if it is impossible that the partnership should be beneficially continued: namely, if the principles on which the scheme is based are found, on examination, to be erroneous and impracticaable, Beaumont *v.* Meredith, 3 Ves. & B. 180; Clough *v.* Radcliffe, 1 De G. & S. 164; or where the partnership is formed to effect a particular object, which is found to be impracticable, and wholly fails, Nockells *v.* Crosby, 3 B. & C. 814, 5 Dow. & R. 751; Seighortner *v.* Weissenborn, 20 N. J. Eq. 172; or where the circumstances have so changed as to render it impossible to carry on the partnership without injury to all the partners, Harrison *v.* Tennant, 21 Beav. 482; or where the object of a partnership is destroyed, as a steamboat, Claiborne *v.* Creditors, 18 La. 501; or if one partner excludes or claims to exclude the other from his proper share of control in the business; or if, though not in terms excluding him, he is so conducting himself, as to render it impossible that the business should be conducted on the stipulated terms. Goodman *v.* Whitcomb, 1 Jac. & W. 569; Hale *v.* Hale, 4 Beav. 369; Smith *v.* Jeyes, 4 Beav. 503; England *v.* Cowling, 8 Beav. 129; Chapman *v.* Beach, 1 Jac. & W. 594; Marshall *v.* Colman, 2 Jac. & W. 266; Richards *v.* Davies, 2 Russ. & M. 347. See also Kennedy *v.* Kennedy, 3 Dana, 239; Gowan *v.* Jeffries, 2 Ashm. 296; Maude *v.* Rodes, 4 Dana, 144; Story *v.* Moon, 8 Dana, 331; Garretson *v.* Weaver, 3 Edw. Ch. 385. In determining whether the court will decree a dissolution, it will consider the state of the partnership business and the probable effect of a decree thereon. Richards *v.* Baurman, 65 N. C. 162. See also Popper *v.* Scheider, 7 Abb. Pr. N. S. 56. And, on a decree for dissolution, equity will make such any order as to render the decree effective; namely, by ordering a defendant, in England, to sign a notice of dissolution in "The London Gazette." Troughton *v.* Hunter, 18 Beav. 470.

(*f*) Norway *v.* Rowe, 19 Ves. 148; Waters *v.* Taylor, 2 Ves. & B. 304; Howell *v.* Harvey, 5 Ark. 278; Master *v.* Kirton, 3 Ves. 74; De Berenger *v.* Hammell, 7 Jarm. Conv. 26; Gow on Part. (3d edit.) 227; Wilson *v.* Greenwood, 1 Swanst. 481; Blakeney *v.* Dufaur, 15 Beav. 40; Hall *v.* Hall, 12 Beav. 414, and note to 419; Williamson *v.* Wilson, 1 Bland, 418; Fogg & Vanderslice *v.* Johnson, 27 Ala. 432; Durbin *v.* Barber, 14 Ohio, 311; Loomis *v.* McKennie, 31 Iowa, 425. Excluding one elected trustee in an unincorporated company may be good ground for a decree dissolving the partnership. Berry *v.* Cross, 3 Sandf. Ch. 1. Or excluding a joint stockholder from his right to participate in the management of the partnership concerns. Werner *v.* Leisen, 31 Wis. 169.

may see that injunction will answer as well as dissolution; and this is to be preferred, because it is a less violent remedy. (*g*) [1]

§ 359. **Dissolution where Continuance Injurious.** — Such is the general language of courts and text-writers. But behind all this lies the general question, whether a court of equity would insist upon binding together, in this relation, two or more parties, one of whom distinctly desired a separation, and this for grounds originating in any kind of misconduct of the others. No application for dissolution by a court is, of course, made where either partner may dissolve it at his pleasure: none, therefore, is made, unless there is a valid contract of partnership to last for a time certain. And, in any such case, we cannot but think the practical rule in this country would be to permit the parties to separate, provided it were obvious that harmonious and profitable co-operation was not to be expected; and especially if this were made impossible by the fault of one partner, and the other desired the dissolution. The cases cited in our notes will show that carelessness and waste in the business of the partnership, the non-entry in the books of money received, the exclusion of the partners plaintiff from an inspection of the books and accounts, or from their due share of influence and power in the concerns of the firm, and permission of a partner in a banking-house to a customer to overdraw, coupled with the taking security therefor to himself personally, — have all been declared sufficient causes for dissolution. (*h*) And it has been said, that where the affairs of a partnership are rightly before the court, and it appears that these causes for dissolution exist,

(*g*) Howell *v.* Harvey, 5 Ark. 279; Taylor *v.* Davis, 3 Beav. 388, note (*e*); Baring *v.* Dix, 1 Cox, 213; Hall *v.* Hall, 12 Beav. 414. In the matter of dissolution, courts will exercise a wide discretion, and will not act upon slight grounds; dissension may in some cases be a sufficient ground. Slemmer's Appeal, 58 Pa. 168. But see note to Hall *v.* Hall, 12 Beav. 414, at p. 419, in which the decision was reversed, on the ground that the bill did not seek a dissolution of the partnership. See also, as to this, Oliver *v.* Hamilton, 2 Anst. 453; Waters *v.* Taylor, 15 Ves. 10; Harrison *v.* Armitage, 4 Madd. 143; Goodman *v.* Whitcomb, 1 Jac. & W. 589; Marshall *v.* Colman, 2 Jac. & W. 266; Richards *v.* Davies, 2 Russ. & M. 347; Smith *v.* Jeyes, 4 Beav. 503; Wallworth *v.* Holt, 4 Mylne & C. 635; Fairthorne *v.* Weston, 3 Hare, 387; Richardson *v.* Hastings, 7 Beav. 325; Bailey *v.* Ford, 13 Sim. 495; Carlen *v.* Drury, 1 Ves. & B. 158. Equity will not interfere to decree the specific execution of an agreement for a partnership, as it might be dissolved immediately afterwards. Henry *v.* Birch, 9 Ves. 357.

(*h*) See cases cited in preceding notes.

[1] Equity will decree a dissolution for the misconduct of a partner. Oteri *v.* Scalzo, 145 U. S. 578. As where a partner persistently violates the articles. Rosenstein *v.* Burns, 41 F. R. 841. So where he excludes his copartner from participation in the business. Groth *v.* Payment, 79 Mich. 290, 44 N. W. 611.

and in a degree to make the partnership injurious to innocent persons, the court will decree dissolution, even although that relief has not been specifically prayed for. (*i*)

§ 360. **Inability to perform Agreements.** — So, pecuniary inability to fulfil material engagements with the other partners, whether it were the fault or the misfortune of the partner, would be deemed a sufficient cause. As, if the partnership rested either expressly or by implication, and substantially, upon the agreement of one of the partners to contribute at any certain time, or under certain circumstances, a certain amount to the funds of the partnership, or to pay certain debts, or make certain purchases for the firm, and he fails to perform this promise, through pecuniary inability, it would be a sufficient cause for dissolution. (*n*) So, if he were unable to do his duty to the firm, by disease, not in its nature temporary, but likely to continue for a long time, if it be not incurable, — as by palsy, for example; or if he permanently loses health or strength in any way, or his skill, or makes it apparent that he does not possess the skill which is needed for the proper execution of the work he undertakes to do, — any cause of this kind would be sufficient. (*o*)

§ 361. **Insanity.** — Insanity, of course, would be among the strongest grounds for decreeing dissolution, especially as the insane partner could not of himself agree to the dissolution, how-

(*i*) Loscombe *v.* Russell, 4 Sim. 11. But see Hall *v.* Hall, 12 Beav. 414, 419 n.

(*n*) Turnipseed *v.* Goodwin, 9 Ala. 372. This case holds that, a partnership being formed for the purpose of buying and selling lands, each partner to furnish an equal share of money, if one should refuse to make the necessary advances, it would be good cause for putting an end to the partnership; but, as long as the partnership subsisted, a larger advance by one partner than it was his duty to make would be compensated by allowing him interest on such excess, or it might furnish a cause of action for a breach of the articles of copartnership. See also, on this point, Boyd *v.* Mynatt, 4 Ala. 79. The same result would arise if one of the partners had lost his capacity to act *sui juris*, by conviction and attainder of treason, or by absconding for debt or crime or felony, or any state-prison offence. Whitman *v.* Leonard, 3 Pick. 117. See Hunt *v.* Clark, 6 De G. M. & G. 232.

(*o*) Pothier says, that if a partnership has been contracted between two persons, founded on the contribution of capital by the one, and of personal labor and skill by the other, and the latter should become disabled by the palsy to afford either the labor or skill, the partnership would be dissolved, because the object of it could not be fulfilled. Traité du Con. de Soc., Nos. 142, 152; 2 Bell's Comm. 634, 635; 3 Kent's Comm. (9th ed.) 71; Story on Part. §§ 291–294. In Sayer *v.* Bennet, 1 Cox, 107, 109, Lord Kenyon said: "I think, indeed, it may be laid down as a general rule (without considering the particular circumstances of the case), that where partners are to contribute skill and industry, as well as capital, if one partner becomes unable to contribute that skill, a court of equity ought to interfere for both their sakes." Jones *v.* Noy, 2 Mylne & K. 125, 129, 130; Wrexham *v.* Hudleston, 1 Swanst. 514, note; Waters *v.* Taylor, 2 Ves. & B. 299; Wray *v.* Hutchinson, 2 Mylne & K. 235, 238.

ever desirable for himself. And here, undoubtedly, a decree of dissolution would be granted upon the petition of those having charge of the insane person and his property, even, perhaps, without any cause additional to the fact of insanity. (*p*) One qualification belongs to this cause, as it does to most of those which have been mentioned: it is that of degree. Of course, delirium from fever, or from a blow on the head, lasting a short time and passing entirely away, would not be sufficient cause. But, while there can be no specific rule as to the measure of insanity which will determine its sufficiency as a cause for the dissolution of partnership, equity would decide such a question by a reference to the universal standard which determines all questions of this kind: Is the insanity such, in cause, character, and degree, as to incapacitate the partner from a reasonable performance of his duty now, and to take away all reasonable hope of his so performing it within a reasonable time? (*q*) [1]

§ 362. **Insanity does not Operate of itself to Dissolve.** — There is one other question, which, although it bears somewhat on the other causes enumerated, is far more important in its reference to insanity; and that is, whether the insanity — supposing it to be certain, complete, and incurable — *of itself* terminates the partnership, or is only good cause for a decree of dissolution. (*r*) The

(*p*) A leading case on this point is Sayer *v.* Bennet, 1 Cox, 108. Lord Eldon refers to this case in deciding that a dissolution of partnership, on the lunacy of a partner, is to be obtained only by decree, and not by the act of the survivors, nor as long as they carry on business with his capital. He says: "It was supposed that I had contradicted Lord Kenyon's doctrine in Sayer *v.* Bennet. Certainly I did not contradict that doctrine; nor did I make any decree which, duly considered, was an assent to it." Waters *v.* Taylor, 2 Ves. & B. 303. See also Kirby *v.* Carr, 3 Y. & C. 184; The Cape Sable Co.'s Case, 3 Bland, 606–674; Griswold *v.* Waddington, 15 Johns. 57; Leaf *v.* Coles, 1 De G. M. & G. 171; Sadler *v.* Lee, 6 Beav. 324; Jones *v.* Noy, 2 Mylne & K. 125; Wrexham *v.* Hudleston, 1 Swanst. 514, note.

(*q*) Pearce *v.* Chamberlain, 2 Ves. 33; Sayer *v.* Bennet, 1 Cox, 107; Sadler *v.* Lee, 6 Beav. 324. See the remarks of Langdale, Ld. Ch., in giving judgment in this last case. See also Crawshay *v.* Maule, 1 Swanst. 514, note.

(*r*) This is the precise question decided in Jones *v.* Noy, 2 Mylne & K. 125. The Master of the Rolls said: "It is clear, upon principle, that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but, in that case, I consider with Lord Kenyon, that, in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be

[1] Raymond *v.* Vaughn, 128 Ill. 256, 21 N. E. 566.

question might come up in this form: A partner is taken to-day with an insanity, which is soon found to be hopeless and entire. Next week, or month, before lawfully appointed guardians have obtained, or could have obtained, a decree of dissolution, his partners, because they are deprived of his sagacity or relieved from his control, rush into mad or even fraudulent speculations, and not only lose all the property of the firm, but bring upon it an insolvency which it will require all the insane man's private property to pay. He is not liable for these debts, if his insanity terminated the partnership; and, we should say, he would not then be liable even, without notice, (*s*) on the same grounds on which notice is not needed where the dissolution is by death. But, if his insanity did not terminate his partnership, he and his property are liable to all innocent parties for all debts contracted before the decree.

This question has been somewhat considered. There are not wanting strong reasons and high authority for the conclusion, that insanity, certain, complete and hopeless, of itself and at once dissolves the partnership. (*t*) But, we think, the decided weight of authority, in England and in this country, opposes this

considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution." See also Kirby *v.* Carr, 3 Y. & C. 184; Besch *v.* Frolich, 1 Phillips Ch. 172, 7 Jur. 73; Sander *v.* Sander, 2 Collyer, 276. Besch *v.* Frolich holds that, on a bill to dissolve a partnership on the ground of the lunacy of a partner, the court will not make its decree retrospective even to the filing of the bill; still less to the time when the defendant first became incapable of attending to business.

(*s*) In reference to the effect of a notice of dissolution to an insane partner, it has been held, that such a notice is sufficient to put an end to a partnership. Mellersh *v.* Keen, 27 Beav. 236; Robertson *v.* Lockie, 10 Jur. 533; Bagshaw *v.* Parker, 10 Beav. 532.

(*t*) C. J. Parker, in Davis *v.* Lane, 10 N. H. 161, says: "It has been held, in England, that the insanity of one partner does not operate as a dissolution of the partnership; but that object must be attained through a court of equity. But the soundness of this principle may, perhaps, be doubted. It certainly could not have been applied here prior to 1832, as we had before that time no court through whose decree in equity a dissolution could have been effected. Admitting it to be correct in its fullest extent, however, it would not affect this case (a question of the agency of a wife during the senseless state of her husband); for each partner has an interest, by the partnership contract, and the interest of one partner would not be terminated by the insanity of another. In making a sale or contract, he does not act as agent, but in his own right; and the partnership name may be used by one, without any supposition that another acts individually, or has any knowledge or volition in relation to the matter. But, so long as the partnership continues, the act of one binds the others; and as it is, in its effect, the act of all the partners, it may deserve great consideration, whether the insanity of one, in the absence of any stipulation to the contrary, does not operate *ipso facto* as a dissolution of the partnership itself."

conclusion, and holds that the partnership continues until it is dissolved by decree. (*u*)

§ 363. **Judicial Determination of Insanity.** — There is one exception which the courts might allow. If the insanity were determined by due inquest, under process of law, and due public notice were given, this might be held to operate a dissolution as effectually as death, and with many of the incidents of a dissolution by death. It is true that, in such case, in this country, a guardian would probably be at once appointed; and this appointment would, as we have seen, effect a dissolution. We think, however, that a legal finding and declaration of insanity might have this effect. It may be well, also, to remark, that, in a case of insanity, when the appointment of guardians would cause much delay, we have no doubt a court of equity would receive a petition from any proper person acting as the next friend of the insane, and, upon cause shown, issue summarily a decree of dissolution. A verdict of an inquisition of lunacy should not, however, have any retrospective influence by relation, and affect any honest transaction which took place previous to the verdict. (*v*)

§ 364. **Business Success becoming Impracticable.** — Besides these causes, it is possible that the continuance of a partnership may become impracticable for any honest purpose, by something in the nature or the condition of the business for which it was formed. As if to carry on a cotton manufactory, and the buildings are burned down, and the partners have no means to build others; or to carry on mining, and it can be shown that the business is disastrous and wasteful, and that only reckless and improvident persons could pursue it. We have seen that such circumstances might, at once, dissolve the partnership. If they had not this effect, equity would certainly give the proper relief

(*u*) See cases cited in preceding notes.

(*v*) In Isler *v.* Baker, 6 Humph. 85, the court held that an inquisition of lunacy found against a member of a partnership dissolves *ipso facto* the partnership. Turley, J., in delivering the opinion of the court, said: "Upon the trial, it was contended for Isler, the administrator of Joseph H. Bryan, that the partnership previously existing between him and Henry H. Bryan was dissolved by the commission of lunacy found against Joseph H. Bryan; and that, therefore, Henry H. Bryan had no power or authority to bind him by the note executed as before stated, and so it was held by the circuit judge, and, as we think, correctly; for, both upon principle and authority, the inquisition of lunacy, as found, did dissolve the partnership, *ipso facto*, and H. H. Bryan, at the time he executed the note, could only bind himself thereby." In Milne *v.* Bartlet, 3 Jur. 358, it was held, that a commission of lunacy finding the fact of insanity was sufficient evidence to justify a decree for dissolution, without a reference to the master for an inquiry. As to the retrospective effect of a decree of dissolution for insanity, see Besch *v.* Frolich cited *ante*, note (*r*).

to any partners who would otherwise be bound by their contract to continue in a business which could only destroy their remaining means, or had become an entirely different thing from that which they had contemplated. (*w*) [1]

§ 365. **Arbitration.** — We doubt whether a dissolution can be said to be made by an award of arbitrators to that effect, even where the award is wholly unobjectionable. Perhaps partners would seldom refuse, except on grounds which would justify setting aside any other award. And, if they did so refuse, equity would probably deem such an award as a cause for decree of dissolution which was entitled to much consideration. But still it must be the acceptance of the award by the parties, and carrying it into effect, or a decree carrying it into effect, which operates the dissolution, and not the award itself. We have seen that equity, as well as law, would be reluctant to enforce an agreement to refer this or any other question to arbitrators; and for the reason that it dislikes to oust itself of its proper jurisdiction. "This court," said Lord Eldon, "is as likely to decide aright as any arbitrators." But as the law holds parties to any award made upon questions actually and properly submitted, and open to no objection from insufficiency of power, or erroneous exercise of power on the part of the arbitrators, so would equity; and, therefore, we think it would compel a dissolution so awarded. (*x*)

(*w*) Baring *v.* Dix, 1 Cox, 213; Claiborne *v.* Creditors, 18 La. 501; Beaumont *v.* Meredith, 3 Ves. & B. 180; Clough *v.* Radcliffe, 1 De G. & S. 164; Nockels *v.* Crosby, 3 B. & C. 814, 5 Dow. & R. 751; Harrison *v.* Tennant, 21 Beav. 482.

(*x*) The leading case on the power of arbitrators to dissolve a partnership when all matters in difference are referred, is Green *v.* Waring, 1 W. Bl. 475. See also Street *v.* Rigby, 6 Ves. 815; Heath *v.* Sansom, 4 B. & Ad. 172; Maley *v.* Newman, 5 Dow. & R. 317; Byers *v.* Van Deusen, 5 Wend. 268; Rolle Arbitr. b. 2; 3 Vin. Abr. 42. If an arbitrator be appointed to arbitrate a certain measure contemplated between two parties as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved. Simmons *v.* Swaine, 1 Taunt. 549.

[1] Where it has become evident that the partnership cannot be continued without great loss, equity will decree a dissolution. Rosenstein *v.* Burns, 41 F. R. 841; Holladay *v.* Elliott, 8 Ore. 84.

CHAPTER XV.

OF BANKRUPTCY AND INSOLVENCY.

SECTION I.

WHEN AND HOW A BANKRUPTCY DISSOLVES A PARTNERSHIP.

§ 366. **Dissolution upon Bankruptcy.** — It is a well-established rule of law and of equity, that Bankruptcy or Insolvency, meaning hereby legal and technical bankruptcy or insolvency, whether of one partner or of the firm *per se*, operates a dissolution of the partnership. (*a*)

§ 367. **Time of Dissolution.** — A question exists, however, as to the time when a dissolution from this cause takes place. In England, it seems now well settled, that the dissolution does not take place until it is formally declared by competent authority; but then it goes back in its effect, by relation, to the time when an act of bankruptcy was committed. (*b*) We should say, that the dissolution took place as soon as the assets were vested in

(*a*) Fox *v.* Hanbury, Cowp. 445; *Ex parte* Smith, 5 Ves. 295; Wilson *v.* Greenwood, 1 Swanst. 471; Crawshay *v.* Collins, 15 Ves. 217; Marquand *v.* New York Manuf. Co., 17 Johns. 525; Griswold *v.* Waddington, 16 Johns. 436, 491; Williamson *v.* Wilson, 1 Bland, 418; Gowan *v.* Jeffries, 2 Ashm. 296; Smith *v.* De Silva, Cowp. 471; *Ex parte* Ruffin, 6 Ves. 126; Crawshay *v.* Maule, 1 Swanst. 507, note; Wilkins *v.* Davis, 15 N. B. R. 460, Lowell, J.; Halsey *v.* Norton, 45 Miss. 703. One who permits himself to be held out as a partner may be made a bankrupt, as a member of the firm, at the suit of a creditor. *Re* Krueger, 2 Low. 66; *Re* Disideri, L. R. 11 Eq. 242; *Re* Rowland, L. R. 1 Ch. 421; Campbell *v.* Hastings, 29 Ark. 512; Carmichael *v.* Greer, 55 Ga. 116. An insolvent member of a dissolved firm, who had given a bond with a solvent surety to his former copartners to pay the debts of the firm, cannot petition his late copartners (the latter being solvent) into bankruptcy. *Re* Bennett, 2 Low. 400. A person who is partner in two firms may be adjudged bankrupt with each firm. *In re* Jewett, 15 N. B. R. 126. A petition of one member of a firm to have the firm declared bankrupt is no bar, before adjudication, to a suit by one of the partners on a claim due him individually. Booth *v.* Meyer, 14 N. B. R. 575. When all the members of one firm are partners in another firm, they cannot prove its debt against the latter. *In re* Savage, 16 N. B. R. 368.

(*b*) Fox *v.* Hanbury, Cowp. 445; Hague *v.* Rolleston, 4 Burr. 2174; *Ex parte* Smith, 5 Ves. 295; Harvey *v.* Crickett, 5 M. & S. 336; Dutton *v.* Morrison, 17 Ves. 194; Barker *v.* Goodair, 11 Ves. 78; Thomason *v.* Frere, 10 East, 418; Siegel *v.* Chidsey, 28 Pa. 287; Smith *v.* Stokes, 1 East, 364.

the assignee, with perhaps a retrospective effect, carrying back the dissolution to the time of the filing of the petition of bankruptcy, or possibly only to the issuing of the warrant. (*c*)

§ 368. **Reason of Dissolution upon Bankruptcy.** — That the cause why bankruptcy operates dissolution, is its taking all interest and property in the partnership stock out of the bankrupt's hands, seems to be clear. Whatever has this effect causes a dissolution. Thus, if there be a prayer for an account and a receiver, the appointment of a receiver operates a dissolution, if he takes all the property into his own hands and possession; so that, after such appointment, the power of giving preferences among the creditors is gone. (*d*) But if he is appointed rather as a manager or overseer, leaving the property where it stood before, we should doubt whether it would have the effect of a dissolution. How far it would control or restrain the power of disposing of the effects would probably depend upon the terms of the decree. Moreover, it was distinctly held, where there were no statutes of insolvency, properly so called, that actual insolvency, or inability and refusal to pay debts, does not operate a dissolution; and the reason assigned is, that it does not of itself transfer the property of the insolvent to assignees. And, even in England, absconding is held not to operate a dissolution, although a very strong act of bankruptcy, on which a sequestration may be founded, which shall go back by relation to the absconding. (*e*)

(*c*) Morton, J., in Arnold *v.* Brown, 24 Pick. 93, held that "the insolvency of one or both partners, we think, would not produce this effect. The insolvency of one might furnish to the other sufficient ground for declaring a dissolution. But, in this State, the inability to pay the company or the private debts of the partners would not *per se* operate as a dissolution." In England, bankruptcy, and in some of our States where insolvent laws exist, legal insolvency may produce a dissolution. Wherever the one or the other operates to vest the bankrupt's or insolvent's property in assignees or other ministers of the law, it would produce that effect. Probably a voluntary assignment by a partner, of all his property, would do the same. In Pennsylvania, it is held, that simple insolvency, without an assignment or any judicial process, does not work a dissolution of the partnership, nor divest the partners of their dominion over the partnership property. Siegel *v.* Chidsey, 28 Pa. 287.

(*d*) Egberts *v.* Wood, 3 Paige, 517. The receiver is entitled to the possession of the books of the firm. Succession of Andrew, 16 La. Ann. 197.

(*e*) Morton, J., in Arnold *v.* Brown, 24 Pick. 94, said: "In England, the absconding would be an act of bankruptcy; and the bankruptcy, when determined by regular adjudication, would create a dissolution. But the absconding is never relied on as a dissolution." And it was held, in accordance with the above, that the absconding of one of the partners of a firm will not produce a dissolution in this country; overruling Whitman *v.* Leonard, 3 Pick. 179, on this point. And see *Ex parte* Smith, 5 Ves. 295; Hilliard on Bankruptcy, § 17; Fox *v.* Hanbury, Cowp. 445; Crispe *v.* Perritt, Willes, 467, 1 Atk. 133; Hague *v.* Rolleston, 4 Burr. 2174; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, 1 East, 368; *Ex parte* Williams, 11 Ves. 5; Wilson *v.* Greenwood, 1 Swanst. 482; Harvey *v.* Crickett, 5 M. & S. 336; Barker *v.* Good-

§ 369. **Analogy between Bankruptcy and Death.** — Formal and complete bankruptcy acts upon a partnership in many respects like death. (*f*) If it be the bankruptcy of the firm, it is like the death of all the partners. If the bankruptcy of one partner, it is like his death. And we should expect this result upon a mercantile partnership, because bankruptcy is the death of the bankrupt as a merchant. If discharged, he may begin again, free from his old debts, and without his old means, and he begins as a new man.

Some of the consequences which illustrate the analogy between bankruptcy and death are these: The bankrupt loses all possession of his property, and all power over it, and all interest in it. There is always a legal possibility that the assets may pay his debts and leave a surplus; and when this happens in fact, the interest and right of the party revive, because he is no longer a bankrupt; but, while he is one, his property is taken wholly from his hands. (*g*)

SECTION II.

OF THE EFFECT OF THE BANKRUPTCY OF A PARTNER UPON SOLVENT PARTNERS.

§ 370. **Rights of Assignee.** — His property, rights, and interests pass from the bankrupt to his assignees. They do not become partners in his stead, because the *dilectus personarum*, and other principles of the law of partnership, prevent this. But they become tenants in common with the partners, and have the rights and obligations of tenants in common, with some qualifications, and, perhaps, some additions, which arise from the peculiar origin of the tenancy. (*h*) Thus, the assignees may claim an

air, 11 Ves. 78; Dutton *v.* Morrison, 17 Ves. 193; Marquand *v.* N. York Manuf. Co., 17 Johns. 529. If a partner absconds, his copartner may take exclusive possession of the property of the firm for the benefit of the firm; and it has been held, that the appointment of a receiver to take charge of the property of the absconding partner does not divest the partner remaining of his right to the partnership property. Hamil *v.* Hamil, 27 Md. 679.

(*f*) Lord Eldon in *Ex parte* Wlliams, 11 Ves. 5. See Rothwell *v.* Dewees, 2 Black, 613.

(*g*) Barstow *v.* Adams, 2 Day, 70; Kitchen *v.* Bartsch, 7 East, 53; Cohen *v.* Gibbs, 1 Hill (S.C.), 206; Stouffer *v.* Coleman, 1 Yeates, 399. The assignment of an insolvent debtor has the same effect. Cooper *v.* Henderson, 6 Binn. 189; Shirley *v.* Long, 6 Rand. 735; Bank *v.* Horn, 17 How. 157.

(*h*) Fox *v.* Hanbury, Cowp. 449; West *v.* Skip, 1 Ves. 239; Smith *v.* Stokes, 1

account, and require a prompt and complete settlement of the concern. (*i*) They cannot take the property and business into their own hands, and settle it themselves, because the solvent partners, at least in equity, hold, in somewhat the same way that surviving partners do, all the effects and property, and for the same purpose, — that of winding up the concern. For this they have the same power and duty, and are under the same obligations, and may be reached by the same process, and compelled to discharge their duty as surviving partners. And the assignees have the same rights and remedies as the representatives of a deceased partner. (*j*) It has, however, been held, that the assignees become at once tenants in common with the solvent partners, their representatives or assigns: they can neither bring trover against the partners for the partnership effects, nor can the solvent partners get their effects out of the hands of the assignees when they have taken possession; for it is said, that at law, they are equally entitled to the possession. (*k*)

East, 363; Smith *v.* Oriell, 1 East, 368; Wilkins *v.* Davis, 15 N. B. R. 66. In Barker *v.* Goodair, 11 Ves. 85, Lord Eldon says. "When one partner becomes a bankrupt, his interest in the partnership property is vested in his assignees; and, according to the doctrine of this court, perhaps with equities in them, vastly beyond what tenants in common have, where no bankruptcy has occurred." And Chancellor Kent, in Murray *v.* Murray, 5 Johns. Ch. 78: "The solvent partner, upon the dissolution of the partnership by bankruptcy, being a tenant in common, may retain and distribute the funds in his possession; and may, as was held in Fox *v.* Hanbury, sell those partnership effects for a valuable consideration, and without fraud. They cannot be called out of his possession by his co-tenants, the assignees, unless under the direction of this court, on a bill filed by them for contribution; or, perhaps, where an account of the joint fund is directed to be taken in bankruptcy. But, on the other hand, there is no foundation, in law or equity, for the solvent partner to call to account either the partnership debtors who have *bonâ fide* settled with the assignees, or the assignees themselves, for the funds in their possession. They hold those funds by an equal title in law with him, as tenants in common; and by a superior equitable title, as trustees, charged with the payment of both the joint and separate debts." Anon., 12 Mod. 446; Wilson *v.* Greenwood, 1 Swanst. 482; Marquand *v.* N. Y. Man. Co., 17 Johns. 525. See Richardson *v.* Tobey, 3 Allen, 81.

(*i*) Hilliard on Bankr. and Ins. 60; Crawshay *v.* Collins, 15 Ves. 218.

(*j*) Crawshay *v.* Collins, 15 Ves. 218; Brown *v.* De Tastet, Jac. 284. In Hubbard *v.* Guild, 1 Duer, 662, it was held, that a solvent partner is not entitled by law to the sole administration of the assets of the partnership, which is dissolved by the separate insolvency of one or more of the partners. The court added, that they saw no reason why the solvent partner should not himself be appointed the receiver, if he would give the necessary security. It seemed to them that in all cases where the dissolution of a partnership is occasioned solely by the insolvency of one of the partners, the solvent partner ought to be appointed receiver, when his capacity and integrity are unquestioned. The appointment was made accordingly. See also Freeland *v.* Stansfield, 2 Sm. & G. 479.

(*k*) Murray *v.* Murray, 5 Johns. Ch. 70; Smith *v.* Stokes, 1 East, 363; Salomons *v.* Nissen, 2 T. R. 674; Fox *v.* Hanbury, Cowp. 445; Smith *v.* Oriell, 1 East, 368; Binford *v.* Dommett, 4 Ves. 756.

§ 371. **Dissolution results necessarily.** — Whether the partnership be determinable at will, or established for a time certain, it is equally and immediately dissolved. And even if there were a provision in the articles, that in case of bankruptcy of one partner, the other partner should take all his share and interest, at a certain valuation, and continue the business, and this provision were carried into full effect, there is, nevertheless, a dissolution of the partnership. (*l*) For the loss of his property and interest takes out the bankrupt partner, and the loss of this partner dissolves the partnership. There is much doubt, however, whether a provision of this kind is not avoided by bankruptcy, because it gives to the bankrupt a power over the disposition of his property which all the principles of the bankrupt laws deny to him; but the question can hardly be considered as settled. (*m*)

§ 372. **Notice not required.** — So, too, no notice or knowledge of the bankruptcy or of the dissolution is requisite, any more than in the case of dissolution by death, to prevent the partner or his assets from being bound for new contracts or debts, and to prevent the solvent partners from acting for him, except to liquidate and realize the balance due to him. The rule arises, in part, from the notoriousness of the fact of legal bankruptcy, and, in part, from the taking from him, by the law, of all his means of satisfying a liability. (*n*)

§ 373. **Solvent Partners continuing Business.** — If the solvent partners, instead of winding up the concern, continue the business, without stay or interruption, they do so at their own peril,

(*l*) Comyn on Cont. (4th Am. ed.) 528.

(*m*) See Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Rigden *v.* Pierce, 6 Madd. 353; Cook *v.* Collingridge, Jac. 607, 620. In Cookson *v.* Cookson, 8 Sim. 543, the case of Cook *v.* Collingridge is criticised. The following are some of the principal authorities applicable to the main point: Lockyer *v.* Savage, 2 Strange, 947; Hunter *v.* Galliers, 2 T. R. 133; *Ex parte* Hill, Cooke's B. L. 228, 1 Cox, 300; *Ex parte* Bennet, Cooke's B. L. 229; *In re* Murphy, 1 Sch. & L. 44; *Ex parte* Henecy, cited id.; *In re* Meaghan, 1 Sch. & L. 179; Dommett *v.* Bedford, 6 T. R. 684, 3 Ves. 149; *Ex parte* Cook, 8 Ves. 353; *Ex parte* Hinton, 14 Ves. 598; *Ex parte* Oxley, 1 Ball & B. 257; Higinbotham *v.* Holme, 19 Ves. 88; *Ex parte* Vere, 19 Ves. 93, 1 Rose, 281; *Ex parte* Young, Buck, 179, 3 Madd. 124; *Ex parte* Hodgson, 19 Ves. 206. And see Brandon *v.* Robinson, 18 Ves. 429. The general distinction seems to be that the owner of the property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law. Note to 1 Swanst. 481.

(*n*) Vulliamy *v.* Noble, 3 Meriv. 614; Lacy *v.* Woolcot, 2 Dow. & R. 458; Thomason *v.* Frere, 10 East, 418; Franklin *v.* Brownlow, 14 Ves. 550, 557.

and upon precisely the same terms and responsibility which have already been stated in reference to surviving partners. (*o*)

§ 374. **Effect of Bankruptcy on Attachment.** — It may be stated, as another instance of the analogy between the actual death of a partner and that bankruptcy which is a commercial death, that the latter suspends, or, rather, annuls, any attachment or execution of his property or his interest in the firm. (*p*)[1] We should say, however, that the American rule of bankruptcy would be applied to this case, if it were a foreign bankruptcy. That is, if there were a foreign firm, which went into bankruptcy abroad, and a creditor of one of the partners, in this State, attached or was levying upon his interest in property within this State, belonging to the firm, the foreign bankruptcy would not suspend this attachment or levy. But, if the foreign assignee had taken possession of the property, his possession would have completed his title, and would prevent the attachment or levy. And, in this respect, our States are foreign to each other. (*q*)

§ 375. **Actions by or against Firm.** — All actions for recovery of debts due to the firm may be brought in the name of the

(*o*) Crawshay *v.* Collins, 15 Ves. 218; Brown *v.* De Tastet, Jac. 392; West *v.* Skip, 1 Ves. 239, 456.

(*p*) Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* Morrison, 17 Ves. 193; *In re* Wait, 1 Jac. & W. 605. The interest of each partner being his share of the surplus, subject to all the partnership accounts, that interest only is liable to the execution of a creditor; and, by the bankruptcy of one, his interest is divested, and vests in the assignees, by relation to the act of bankruptcy. Brickwood *v.* Miller, 3 Meriv. 279; *Ex parte* Farlow, 1 Rose, 421; Caldwell *v.* Gregory, 1 Price, 119–130; *Ex parte* Peake, 1 Madd. 358; *Ex parte* Ruffin, 6 Ves. 126; *Ex parte* Rowlandson, 1 Rose, 419; Campbell *v.* Mullett, 2 Swanst. 551–575; Egberts *v.* Wood, 3 Paige, 517. See Willis *v.* Freeman, 35 Vt. 44. The subject of the attachment of a partner's interest is discussed in Day *v.* McQuillan, 13 Minn. 205.

(*q*) The authorities on these points are very numerous, and at one time were very conflicting. The later authorities generally support the text, which is the American, in opposition to the English, doctrine. We furnish a number of the authorities, both early and recent. Proctor *v.* Moore, 1 Mass. 198; Baker *v.* Wheaton, 5 Mass. 509; Watson *v.* Bourne, 10 Mass. 337; Ogden *v.* Saunders, 12 Wheat. 213; Prentiss *v.* Savage, 13 Mass. 20; Tappan *v.* Poor, 15 Mass. 419, 422; Blake *v.* Williams, 6 Pick. 286, 306; Agnew *v.* Platt, 15 Pick. 417; Betts *v.* Bagley, 12 Pick. 572, 579; Savage *v.* Marsh, 10 Met. 594; Fiske *v.* Foster, 10 Met. 597; Springer *v.* Foster, 2 Story, 383; Shaw *v.* Robbins, 12 Wheat. 369, note; Milne *v.* Moreton, 6 Binn. 353; Harrison *v.* Sterry, 5 Cranch, 289, 302; The Watchman, 1 Ware, 232, 237; Dawes *v.* Head, 3 Pick. 128; Richards *v.* Dutch, 8 Mass. 506; Burk *v.* McClain, 1 H. & McH. 236; Wallace *v.* Patterson, 2 H. & McH. 463; Ward *v.* Morris, 4 H. & McH. 330; Smith *v.* Smith, 2 Johns. 235; Bird *v.* Caritat, 2 Johns. 342. See Nicholson *v.* Ricketts, 2 E. & E. 497.

[1] The reason of this is that the bankruptcy and assignment pass the title to the assignee; and the creditors of the partners cannot attach property belonging to the assignee and the solvent partner. See however Fern *v.* Cushing, 4 Cush. 357, *contra;* see also Forsaith *v.* Merritt, 1 Low. 336 (*semble*).

solvent partners and the assignees of the bankrupt partners; (*r*)[1] and all actions against the firm should be brought against all the partners by name, (*s*) including the bankrupt, (*t*) unless he has been discharged. (*u*) If he has been discharged, and is still made defendant, it would seem that he may have judgment against the plaintiff; and the plaintiff may have judgment against the other partners. (*v*) In suits in equity, different rules prevail from those which govern suits at law. The general principle there may be said to be, that the parties actually interested must always be joined, whether as plaintiffs or defendants. (*w*)

§ 376. **Effect of Discharge of one Partner.** — If one partner be bankrupt, his discharge does not discharge the other partners, nor affect their indebtedness, excepting as to the sum which the creditor takes by way of dividend; which is, of course, deducted from the debt due to him. If all the partners, or the firm as such, become bankrupt, it is still true that the discharge of one or more affects only those discharged. (*x*)[2] If other partners

(*r*) Thomason *v.* Frere, 10 East, 418; Murray *v.* Murray, 5 Johns. Ch. 70; Hacker *v.* Shepherd, 2 Chitty, 652; Graham *v.* Robertson, 2 T. R. 282. An action does not abate by the bankruptcy of the plaintiff. The assignees can continue the action in his name. Waugh *v.* Austen, 3 T. R. 437.

(*s*) Bristow *v.* James, 7 T. R. 257; Byers *v.* Dobie, 1 H. Bl. 236; Ditchburn *v.* Spracklin, 5 Esp. 31; Dodge *v.* Dicas, 3 B. & Ald. 611; Rice *v.* Shute, 5 Burr. 2611; Vernon *v.* Jefferys, 2 Strange, 1146. But see, under a peculiar state of facts, Colwell *v.* Lawrence, 38 Barb. 643.

(*t*) 1 Chit. Pl. (10th Am ed.) 53.

(*u*) Tuttle *v.* Cooper, 10 Pick. 291.

(*v*) "Where a defence can be made by one or more of the defendants, either by plea or by proof on the trial which admits the making of the original joint contract, but shows matter of personal exemption or discharge, whether such exemption arises from an incapacity to contract (as in case of coverture or infancy) or by matter of subsequent discharge (as in case of bankruptcy), but which leaves the other contracting parties liable to the performance of the contract, such party may have a separate judgment against the plaintiff, and the plaintiff may have a valid judgment against the other contracting parties." Per Shaw, C. J., in Tuttle *v.* Cooper, 10 Pick. 291. A discharge in bankruptcy granted to one member of a partnership, after he alone had been adjudged bankrupt, in a proceeding affecting him alone, to which his copartner was not a party, is not a bar to an action, against him and his copartners, by a partnership creditor, when the creditor shows affirmatively, that, at the time of the petition, there were partnership assets as well as partnership debts. Crompton *v.* Conkling, 15 N. B. R. 417. But see Wilkins *v.* Davis, 15 N. B. R. 60; *In re* Jewett 15 N. B. R. 126, 139.

(*w*) Mechanics' Bank *v.* Seton, 1 Pet. 299; Story *v.* Livingstone, 13 Pet. 359; Hussey *v.* Dole, 24 Me. 20; McConnell *v.* McConnell, 11 Vt. 290; Noyes *v.* Sawyer, 3 Vt. 160; Crocker *v.* Higgins, 7 Conn. 342; Hawley *v.* Cramer, 4 Cow. 717; Oliver *v.* Palmer, 11 G. & J. 426; Park *v.* Ballentine, 6 Blackf. 223; West *v.* Randall, 2 Mass. 181.

(*x*) A partner who, after getting his certificate, has taken up the notes of the

[1] McNutt *v.* King, 59 Ala. 597; Halsey *v.* Norton, 45 Miss. 703; Browning *v.* Marvin, 22 Hun, 547. But see *contra*, Cunningham *v.* Munroe, 15 Gray, 471.

[2] Where a partner becomes bankrupt individually and is discharged, the firm assets

are not discharged, each of them may be sued for the whole of the balance of the debt which remains unpaid. (*y*) The bankruptcy itself operates a discharge of an execution against the partnership, because it supersedes all remedies which any creditor resorts to, in favor of all the creditors, for whose equal benefit it takes possession of all the property. (*z*)

§ 377. **Power of Solvent Partner.** — There are many cases in England turning upon the right of the solvent partner to pay debts, or otherwise dispose of the common property, after an *act* of bankruptcy by a partner, but before a declared bankruptcy. There, as soon as the decree of bankruptcy is made, it goes back by relation, as we have before remarked, and makes the bankruptcy effectual from the first act of bankruptcy. And, with us, all transfers or payments before the bankruptcy, made in contemplation of, it, or within a certain period before it, are avoided as against the general creditors. (*a*) We apprehend this rule, on principle, must apply here to the acts of the solvent partner. In general, these acts cannot affect the creditors of the firm, because the solvent partner is bound *in solido* to pay them. What he does, however, may waste his means, so that he ceases to be solvent, or it may indirectly affect the several debtors, by lessening a surplus of his interest in the joint fund to which they might look. But, to any questions of this kind, there is but one principle applicable in practice. It is, that the solvent partner has possession of, and full power over, all the effects of the partnership; after the bankruptcy is declared, that partnership is dissolved;

firm is permitted to prove against the joint estate. Atkins *v.* Atkins, Buck, 479.

(*y*) *Ex parte* Bolton, Buck, 13; Heath *v.* Hall, 4 Taunt. 326; Sleech's Case, 1 Meriv. 570; Browne *v.* Carr, 7 Bing. 508.

(*z*) Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* Morrison, 17 Ves. 193; *In re* Wait, 1 Jac. & W. 605.

(*a*) Everett *v.* Stone, 3 Story, 446; Hassels *v.* Simpson, Doug. 92; McKenzie *v.* Garrison, 10 Rich. 234; Atkinson *v.* Farmers' Bank, Crabbe, 529; Fidgeon *v.* Sharp, 1 Marsh. 198.

not being conveyed nor the firm creditors included in the schedule, the bankrupt is not discharged from his firm debts. Glenn *v.* Arnold, 56 Cal. 631; Corey *v.* Perry, 67 Me. 140; Poillon *v.* Lawrence, 77 N. Y. 207 (*semble*). Consequently where A. was a member of two firms, and A. himself and one of the firms became bankrupt and obtained a discharge, A. was not discharged from the debts of the other firm. Perkins *v.* Fisher, 80 Ky. 11. But it has been held that a discharge of a bankrupt from *all* his debts operates necessarily to discharge him from the debts of a firm to which he belongs; Hawley *v.* Campbell, 62 Cal. 442; and it has been held in some jurisdictions that since the partnership debts are provable against the individual partner, any discharge of the partner necessarily protects him against the partnership obligations. *Ex parte* Hammond, L. R. 16 Eq. 614; *In re* Webb, 4 Sawy. 326; Willson *v.* Gomparts, 11 Johns. 193. See Barclay *v.* Phelps, 4 Met. 397.

and now this solvent partner holds and disposes of the effects, as trustee, for all interested. (*b*) [1] And if, in the exercise of his undoubted power, either before or after the declaration of bankruptcy, he commits a fraud, actual or constructive, all those whom it would injure may avoid it, or have their remedy against him for the damages it causes. (*c*)

§ 378. **Proof by Partner against Copartner.** — A rule has been laid down in England, and referred to a special provision in what is there called Sir Samuel Romilly's act, which rests also on general principles and sound reason, and has, we consider, been adopted in the jurisprudence of this country. It is this: Each partner is liable for all the debts of the firm; but each partner is liable, as a principal debtor, for his own share, and as a surety for the other partners for the remainder. Hence, a solvent partner who pays all the debts of the concern may prove, against assignees of the insolvent partner, that proportion of what the solvent partner has paid which the insolvent would have paid if also solvent. (*d*) Thus, if a firm consist of three persons, and owes large debts, two of the three become insolvent, and the third pays all the joint debts. He has paid one-third as his own debt, and two-thirds as the debts of the other partners, one-third each. But it seems that the solvent partner cannot consider the other two as sureties for each other to him. If, therefore, one of the two has a large separate estate, and the other little or nothing, all he can do is to prove his third against the one, and the other third against the other, although he may get no dividend on this latter third. This, at least, would seem to be the prevailing doctrine in the decided cases. (*e*) But Lord Eldon expressed a different opinion, and remarked, that he thought the equity which

(*b*) Fox *v.* Hanbury, Cowp. 445; Harvey *v.* Crickett, 5 M. & S. 336; Parker *v.* Muggridge, 2 Story, 346; Woodbridge *v.* Swann, 4 B. & Ad. 633; *In re* Robinson, 1 Mont. & A. 18; Smith *v.* Oriell, 1 East, 368; De Tastet *v.* Carroll, 1 Stark. 88; *In re* Wait, 1 Jac. & W. 605. See Westcott *v.* Tyson, 38 Pa. 389, on the question of one of the insolvent partners assisting a third party in the purchase of the creditors' claim.

(*c*) Ramsbottom *v.* Duck, 1 Mont. on Part. 135, appendix; Biggs *v.* Fellows, 8 B. & C. 402. See Ransom *v.* Van Deventer, 41 Barb. 307; Walsh *v.* Kelly, 42 Barb. 98.

(*d*) Watson *v.* Sheath, 4 Madd. 477; Butcher *v.* Forman, 6 Hill, 585, per Nelson, C. J.

(*e*) *Ex parte* Yonge, 3 Ves. & B. 35 called *Ex parte* Young in 2 Rose, 40; *Ex parte* Ogilby, 3 Ves. & B. 133, called *Ex parte*

[1] So where two firms entered into an adventure in partnership, and one of the firms became insolvent, the other firm had a right to take all the assets of the joint adventure for the purpose of settling the accounts. Meador *v.* Hughes, 14 Bush, 652.

made them sureties to each other for each other continued after the bankruptcy. (*f*) And this rule seems to have been applied in one case. (*g*) [1]

§ 379. **Acceptance of Assignee as Debtor.** — The assignees and the creditors may lose their claim against a retiring partner for debts due from the partnership, by the assignees making themselves responsible. Thus, if after the retirement, and an agreement between the partners that the remaining partner shall continue the business and pay all the debts, and a part of that business was to act for the assignees in settlement of a bankrupt estate; and the assignees, knowing the retirement and agreement, continued to employ the remaining partner alone, and he became insolvent, and it turned out that the partnership owed a large balance to the estate or to the assignees, — the creditors have no power to hold the retiring partner, because the assignees have discharged him by their acts; but they will hold the assignees as

Ogilvy in 2 Rose, 177; Wood *v.* Dodgson, 2 M. & S. 195; *Ex parte* Watson, Buck, 449. In *Ex parte* Taylor, 2 Rose, 175, a solvent partner was holden entitled to prove against the estate of a bankrupt copartner the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying the bankrupt against them. And in *Ex parte* King, 17 Ves. 115, under a joint commission, the separate estate of one was determined to have a lien on the other's share of a surplus of the joint estate, in respect of a debt proved upon bills drawn by the one in the name of the firm for a separate debt; and that the joint creditors might come in with the separate creditors for the deficiency. See also *Ex parte* Reid, 2 Rose, 84.

(*f*) *Ex parte* Hunter, Buck, 552; *Ex parte* Smith, Buck, 492.

(*g*) *Ex parte* Plowden, 3 Mont. & A. 402, 2 Deac. 456. A., B., & C. being partners, A. and B. borrowed 10,000*l.* for the firm on mortgages of their separate estates. The firm became bankrupt; C. was wholly insolvent; and A.'s mortgaged estate pays more than his share of the debt. It was held that A.'s estate has a claim to contribution from B.'s for the difference between what B.'s estate sells for and half the debt of 10,000*l.* Sir John Cross observed: "The rights of the parties are not altered by bankruptcy. The facts, therefore, are simply these: two codebtors give mortgages as security on their several estates. As one failed to make good the sum secured, the other has made up the difference, whereas the amount should be charged equally on the two estates. I am of opinion that, as the assignees have 2,771*l.* in their hands, the separate creditors of Jellicorse are entitled to that sum, after which his estate will have paid 1,000*l.* more than Kempson's; therefore the whole 2,771*l.*, subject to the claim for 159*l.*, should be paid over to the separate estate of Jellicorse."

[1] It has been held that a partner cannot prove a claim for contribution against his copartner, who is bankrupt, in competition with the separate creditors. *In re* Hamilton, 1 F. R. 800. It was intimated in the same case that if a partner fraudulently appropriated firm assets, the joint estate might prove the amount against the separate estate in competition with firm creditors; but could not do so if the appropriation was not fraudulent. *Acc.*, Cowan *v.* Gill, 11 Lea, 674. In Bird *v.* Bird, 77 Me. 499, 1 Atl. 455, however, it was held that the joint estate might prove against the separate estate, in competition with the separate creditors, even for a mere debt due the firm by the partner.

personally responsible. (*h*) The court has gone so far as to permit a retiring partner to prove his claim against the bankrupt partner, although the debts of the firm were not paid, when the joint creditors have discharged the retiring partner, by directly or indirectly accepting the remaining partner as their only creditor, as by sanctioning by their conduct and acquiescence an arrangement to that effect between the partners. (*i*) Such a case must be rare, however.

§ 380. **Exception in case of Fraud.** — This distinction seems also to be taken. If one is defrauded into advancing money to become a partner, and the fraudulent party becomes bankrupt, the defrauded party may prove against his estate for the amount he so advanced, unless he had held himself out as a partner. By so doing, even for a very short time, he had incurred the liabilities of a partner, and cannot prove in competition with joint creditors. (*j*) If a retiring partner has a covenant of the remaining partner to pay all the debts, but the remaining partner becomes bankrupt, leaving them or any of them unpaid, and the retiring partner is held to pay them, and does pay them, — for the amount he so pays he may prove against the several estate of the bankrupt partner. (*k*)

(*h*) If an assignee under a commission of bankruptcy employs an agent to receive money, and he embezzles it, the assignee will be liable to make it good to the creditors, unless he consulted the body of the creditors in the appointment of the agent. *In re* Litchfield, 1 Atk. 87.

(*i*) *Ex parte* Grazebrook, *In re* Naylor, 2 Deac. & Ch. 186. In this case, A., being a dormant partner with B., dissolves the partnership, and B. is declared indebted to A. on balance. A. sues B. for balance, and receives *cognovit* for debt and costs. B. becomes bankrupt. It was held that A. is entitled to prove his debts against the estate, although some partnership debts are unpaid. See also Parker *v.* Ramsbottom, 3 B. & C. 257. And see *contra*, in case of ostensible partners, *Ex parte* Ellis, 2 Glyn & J. 312; *Ex parte* Carter, 2 Glyn & J. 233. And see *Ex parte* Moore, 2 Glyn & J. 166.

(*j*) In *Ex parte* Broome, 1 Rose, 69, A., induced by the fraudulent representations of B. as to the profits of his business, gives him a certain sum of money for a share of it. On the discovery of the fraud, A. files a bill in equity for an account, to have the partnership declared void, and for a receiver. The receiver was ordered. B. becomes bankrupt. Petition by A. to be admitted to prove his commission refused, with liberty to make a claim. It was held that although A., as against B., might have an equity to say he never was a partner, it would be difficult to say so as against third persons. Lord Eldon expressed himself at first inclined to grant the prayer of the petition, provided the petitioner would abandon the suit in equity and the receiver, but took time to consider; and afterwards (observing that although the petitioner might have an equity to be considered as never having been a partner, yet that it was extremely difficult to say that, as to third persons, he was not a partner), made an order that the petitioner should be at liberty to enter a claim only for the amount of his demand, but not to prove with the separate creditors.

(*k*) Wood *v.* Dodgson, 1 Rose, 47. In this case, a partner continuing the business took an assignment of all the stock,

§ 381. **Proof between Firms with Common Member.** — We have already referred to the case, not unfrequently occurring, where there are two firms, with some persons who are partners in both. We have seen that no suit at law can be maintained between them; but a suit in equity may be. And whether one firm can prove against the other firm seems to be determined by the question, whether the one firm is liable for the joint debts of the other. That is, if the solvent firm must pay the debts of a bankrupt firm, it cannot prove against the estate of that firm in competition with the creditors whom the solvent firm must itself satisfy. (*l*) [1]

It has been held that an agreement between one partner and a third person, that the latter shall share in the profits of the former, as profits, renders him liable as a partner to the creditors of the firm, although, as regards the other members of the firm, he is not their copartner. (*ll*)

&c., and covenanted to indemnify the retiring partner from the debts then owing from the partnership. The continuing partner became bankrupt, and obtained his certicate; and subsequently an action was commenced against the retiring partner, upon an acceptance of the partnership. It was held that no action would lie against the bankrupt upon the covenant, since, under 49 Geo. 3, ch. 121, § 8, the retiring partner might, on his liability, have resorted to and proved his debt, under the commission, and was therefore barred by the certificate. See also *Ex parte* Young, 2 Rose, 40; *Ex parte* Hesham, 1 Rose, 146. So, one partner may agree to give a retiring partner a sum for the concern, though they knew the partnership to be insolvent (provided no fraud was intended), and the estate will be liable. *Ex parte* Peake, *In re* Lightoller, a bankrupt, 1 Madd. 346, 354. See also Perring *v.* Hare, 2 C. & P. 401; Whiting *v.* Furanet, 1 Conn. 60.

(*l*) *Ex parte* Adams, 1 Rose, 305. See also Cooke's Bankr. Laws, 538; *Ex parte* Hesham, 1 Rose, 146; *Ex parte* Cook, Mont. 228; Cases of Shakeshaft, Stirrup & Salisbury, 6 Ves. 123, 743, 747; *Ex parte* Hargreaves, 1 Cox, 440; *Ex parte* St. Barbe, 11 Ves. 413; *Ex parte* St. Johns, Cooke's B. L. 510; *Ex parte* Castell, *Ex parte* Stroud, 2 Glyn & J. 124, 127; *Ex parte* Sillitoe, 1 Glyn & J. 374; *Ex parte* Williams, 3 Mont. D. & D. 433; McCormick's Appeal, 55 Pa. 252.

(*ll*) Fitch *v.* Harrington, 13 Gray, 468. See, on the relative rights of creditors of the firm and creditors of the individual partners, Reeves *v.* Ayres, 38 Ill. 418; Lewis *v.* Conrad, 11 Ia. 153; Levally *v.* Ellis, 13 Ia. 544; Jones *v.* Jones, 13 Ia. 276. A person who lends the entire capital to an individual partner, for the purpose of commencing business, has an equity equal to that of the creditors of the firm. Reeves *v.* Ayres, 38 Ill. 418.

[1] If both firms are bankrupt, it is clear that there can be no proof by one against the other. See *In re* Wakeham, 13 Q. B. D. 43.

SECTION III.

HOW THE FUNDS ARE APPROPRIATED TO THE DEBTS.

§ 382. **Distribution of the Joint Estate.** — We have seen that the great majority of interesting questions concerning partnership fall within the jurisdiction of equity. This is still more the case with questions of bankruptcy, which go into equity almost exclusively. We might expect that questions which connect partnership with bankruptcy would be, more than most others, determined on equitable principles. Hence the rule is distinctly established in equity, that, in bankruptcy of a partnership, the joint property forms a fund appropriated to the joint creditors, and the several property of each creditor a several fund appropriated to the several creditors of each partner.[1] And the joint creditors cannot go to the several property until the several creditors are paid in full, and there is a surplus over, by which the joint creditors may benefit. On the other hand, the several creditors cannot look to the joint fund until all the joint debts are paid, and there is a surplus; and then the several creditors of a partner may resort to that partner's interest in that surplus. (*m*) It has, however, been held that, if one partner pays

(*m*) *In re* Smith, 16 Johns. 102; Fox *v.* Hanbury, Cowp. 445; Moody *v.* Payne, 2 Johns. Ch. 548; Eddie *v.* Davidson, Doug. 650; Smith *v.* Stokes, 1 East, 367; Wilson *v.* Gibbs, 2 Johns. 282; Taylor *v.* Fields, 4 Ves. 396; Chapman *v.* Koops, 3 B. & P. 289; Parker *v.* Pistor, 3 B. & P. 288; Croft *v.* Pyke, 3 P. Wms. 182; *Ex parte* Ruff, 6 Ve 126; *Ex parte* Williams, 11 Ves. 5; West *v.* Skip, 1 Ves. Sen. 239, 242; note to Young *v.* Keighly, 15 Ves. 559; Dutton *v.* Morrison, 17 Ves. 193–205; Watson *v.* Taylor, 2 Ves. & B. 299; King *v.* Sanderson, 1 Wightw. 50;

[1] When a partnership is insolvent, the partnership creditors have the priority with regard to the partnership assets. They are to be paid in full, before the separate creditors can come upon the assets. Peters *v.* Bain, 133 U. S. 670; Evans *v.* Winston, 74 Ala. 349; Union Nat. Bank *v.* Bank of Commerce, 94 Ill. 271; Moody *v.* Downs, 63 N. H. 50; Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80.

It is held in England that where a person is represented as partner in a business, which really belongs to a sole trader, (that is, where there is only a partnership by holding out), the assets of the business are to be treated, for the purpose of distribution in bankruptcy, as partnership assets, and the creditors of the business are to be confined to them. *In re* Rowland, L. R. 1 Ch. 421; *Ex parte* Hayman, 8 Ch. D. 11 (C. A.), *Acc. In re* Krueger, 2 Low. 66. In Texas, however, it has been held that since there is no partnership, only an estoppel as to certain persons to deny one, the creditors of the business will be given no priority over the individual creditors in distributing the assets of the business. Grabenheimer *v.* Rindskoff, 64 Tex. 49.

more than his share of the partnership debts, he has in equity a claim on the partnership property, superior to the claims of the separate creditors of the copartners. (*mm*)

It has been held that the separate creditors of a person who is a member of two partnerships have a preference as to his interest in property in one of the firms, as against creditors of the other firm. (*mmm*)

§ 383. **Distribution of Partner's Separate Estate.** — So far as the inability of the several creditors to look to the joint fund until the payment of the debts leaves a surplus, the law also is quite settled. But it is not settled that the partnership creditors may not at law look to the several funds at once, in common with the several creditors.[1] So far as the present weight of authority

King *v.* Rock, 2 Price Exch. 198; Barker *v.* Goodair, 11 Ves. 78–85; Church *v.* Knox, 2 Day, 514; Peirce *v.* Jackson, 6 Mass. 242; Wilson *v.* Conine, 2 Johns. 280; Knox *v.* Simmons, 4 Yeates, 477; Wallace *v.* Patterson, 2 H. & McH. 463; Harrison *v.* Sterry, 5 Cranch, 289; McCoombe *v.* Dunch, 2 Dall. 73; Sanderson *v.* Stockdale, 11 Md. 563; Linford *v.* Linford, 4 Dutch. 113; Dunham *v.* Hanna, 18 Ind. 270; Tenney *v.* Johnson, 43 N. H. 144; Nixon *v.* Nash, 12 Ohio, 647. See Backus *v.* Murphy, 39 Pa. 397; Cope's Appeal, 39 Pa. 284; Houseal's Appeal, 45 Pa. 484; Crawford *v.* Baum, 12 Rich. L. 75; Willis *v.* Freeman, 35 Vt. 44: Lewis *v.* Conrad, 11 Ia. 481.

(*mm*) Crooker *v.* Crooker, 52 Me. 267.

(*mmm*) Weaver *v.* Weaver, 46 N. H. 188.

1 Since the partners are liable for all firm debts, it would seem that the partnership creditors might also prove against the estates of the individual partners, and share with the other individual creditors. That they may make proof of their claims against the individual estates is everywhere admitted. *In re* Johnston, 17 F. R. 71; Barclay *v.* Phelps, 4 Met. 397. But the rule has become established in the majority of jurisdictions that the partnership creditors cannot usually share with the individual creditors in the individual assets. Peters *v.* Bain, 133 U. S. 670; *In re* Hollister, 3 F. R. 452; *In re* Johnston, 17 F. R. 71; *In re* Lloyd, 22 F. R. 90; Claflin *v.* Behr, 89 Ala. 503, 8 So. 45; Union Nat. Bank *v.* Bank of Commerce, 94 Ill. 271; Bond *v.* Nave, 62 Ind. 505; Bake *v.* Smiley, 84 Ind. 212; New Market Nat. Bank *v.* Locke, 89 Ind. 428; Riley *v.* Carter, (Md.) 25 Atl. 667; Hundley *v.* Farris, 103 Mo. 78, 15 S. W. 312 (overruling a dictum in Shackelford *v.* Clark, 78 Mo. 491); Moody *v.* Downs, 63 N. H. 50; Davis *v.* Howell, 33 N. J. Eq. 72; Morgan *v.* Skidmore, 55 Barb. 263 (*semble*); Rodgers *v.* Meranda, 7 Oh. St. 179; Black's Appeal, 44 Pa. 503; Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80; Fowlkes *v.* Bowers, 11 Lea, 144. See McCormick's Appeal, 55 Pa. 252.

In some jurisdictions, however, another rule is adopted. Thus the rule prevails in certain States that the partnership creditors have priority in the partnership assets, and share the separate assets with the separate creditors. Camp *v.* Grant, 21 Conn. 41; Guéringer *v.* His Creditors, 33 La. Ann. 1279. Or, more commonly, it is held that where the firm assets are insufficient the partnership creditors may prove the balance against the separate estates in competition with the separate creditors. Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502 (see Adickes *v.* Lowry, 15 S. C. 128); Bardwell *v.* Perry, 19 Vt. 292; Pettyjohn *v.* Woodroof, 86 Va. 478, 10 S. E. 715. In Kentucky the peculiar rule prevails that when the partnership creditors have exhausted the firm assets they can get nothing more till the individual creditors have been paid the same proportion of their claims; and they then share the separate assets remaining with the

goes, it might seem that the joint creditors have this power. But of late the law, as we have said, seems distinctly tending to adopt this rule of equity, or rather this half of the equitable rule; (n) the reason given being that the other half without this half would be inequitable, and that there is no good reason for confining the several creditors to the several fund, which does not equally require that the joint creditors should be confined to the joint fund. This whole rule in equity has not been established without conflict and fluctuation; and is not free now from doubt, in some minds, as to its justice, reasonableness, and expediency. It seems to be a simple rule, eminently practical, and founded upon principles of policy so obvious that they upon whom the rule presses heavily are seldom disposed to question its general propriety. (o)

(n) Separate creditors cannot, in *bankruptcy*, take a dividend ratably with the joint creditors: each estate is applicable to its own debts. The usual directions are to apply the funds respectively; the joint to the joint debts, the separate to the separate debts, the surplus of each to the creditors remaining on the other. *Ex parte* Elton, 3 Ves. 238; Rainey *v.* Nunse, 54 Ill. 29. In a New York case, Terry *v.* Butler, 43 Barb. 395, the court, in reversing a judgment, on appeal, observed: "But there is another branch of the case, in respect to which a serious difficulty exists, which does not seem to have been adverted to before the referees, and which requires a reversal of the judgment. The order appointing the plaintiff receiver was founded on a demand owing by Putnam & Butler as copartners. The property in the hands of the assignees, and which they are directed by the judgment herein to transfer to the plaintiff, is the separate property of Butler. The judgment, also, directs the plaintiff, as receiver, to apply the avails of said separate property to the payment of the said copartnership demand. In this respect, I think it is erroneous. In equity, the separate estate is not liable for partnership demands, until the partnership effects are exhausted and the separate debts are paid. In the case at bar, it appears sufficiently, perhaps, that the remedy at law against the partnership property has been exhausted by the proceedings had in the legal action against Putnam & Butler, set forth in the complaint and admitted on the trial. But there is no evidence that the separate debts of Butler have been paid. As the judgment makes no provision for the payment of the separate debts, but, in effect, postpones them until the plaintiff's claim against the firm is satisfied out of the separate estate, instead of directing payment of the plaintiff's demand out of the *surplus*, if any remains, after payment of the separate debts, it is, therefore, erroneous and must be set aside, and a new trial must be had." See also the authorities cited in the next preceding and succeeding notes. And see Moline Co. *v.* Webster, 26 Ill. 233; Pahlman *v.* Graves, 26 Ill. 405; Weyer *v.* Thornburgh, 15 Ind. 124; Jackson *v.* Clymer, 43 Pa. 79; Black's Appeal, 44 Pa. 503; Heckman *v.* Messinger, 49 Pa. 465; Northern Bank of Kentucky *v.* Keizer, 2 Duv. 169; Whitehead *v.* Chadwell, 2 Duv. 432.

(o) The cases on these questions are

separate creditors, *pari passu.* Fayette Nat. Bank *v.* Kenney, 79 Ky. 133. Whatever rule is adopted, for the benefit of separate creditors, it cannot undo the previous voluntary act of the partner. If the partner has paid a firm debt with his individual property, or conveyed such property to the firm, individual creditors cannot complain. Winslow *v.* Wallace, 116 Ind. 317, 17 N. E. 923; Indianapolis Board of Trade *v.* Wallace, 117 Ind. 599, 18 N. E. 48.

§ 384. **Distribution where no Joint Estate.** — This rule can apply only where there are matters to which it can apply; as where there are joint debts and joint funds, and also several debts and several funds. It is, therefore, not properly an exception to the rule where there is no joint estate or no living solvent partner, or where there are no separate debts.[1] These cases, which are sometimes called exceptions to the rule, should rather be thought to fall without the rule. (*p*) There is, however, one technical exception recognized in England, — when a creditor of

very numerous. The questions are considered quite fully in Murray *v.* Murray, 5 Johns. Ch. 60; Bell *v.* Newman, 5 S. & R. 78; Allen *v.* Wells, 22 Pick. 450, where many of the conflicting cases are examined. In Jarvis *v.* Brooks, 23 N. H. 136, Perley, J., in delivering the opinion of the court, says: "The right of the partnership creditors to a preference in the application of the partnership funds having been admitted in this State, the question raised in this case is, whether the corresponding and correlative rule, giving a preference to the individual creditor over his debtor's separate estate, is also to be considered as having been adopted as a branch and member of the same equitable doctrine. If the preference is admitted in favor of the joint creditor, but denied to the separate creditor, the principle of equality and reciprocity, upon which the interference of equity with the legal rule has been vindicated in England, wholly fails. We have admitted the equitable rule, which takes away the separate creditor's legal right to satisfy his debt upon an undivided moiety of the partnership property. Principle, consistency, and equal justice to the separate creditors, would seem to require that we should also adopt the other branch of the same equitable doctrine, and there is no greater difficulty in administering one branch of the doctrine than the other; both may be directly asserted at law with equal convenience." See Sniffer *v.* Sass, 14 Rich. L. 20.

(*p*) *Ex parte* Sadler, 15 Ves. 52; *Ex parte* Machell, 2 Ves. & B. 216; *Ex parte* Abel, 4 Ves. 837; *Ex parte* Clay, 6 Ves. 813; *Ex parte* Chandler, 9 Ves. 35; *Ex parte* Hall, 9 Ves. 349; *Ex parte* Elton, 3 Ves. 238 and note (Sumner's ed.); *Ex parte* Hubbard, 13 Ves. 424. The principle that there should be no joint estate has been carried to such an extremely rigorous extent, that, in one case where the joint property was but 5*l.*, and in another only 1*l.* 11*s.* and 6*d.*, the joint creditors were refused permission to take dividends under the separate estate, so fine has the distinction been drawn. *Ex parte* Peake, 2 Rose, 54; *In re* Lee, id. note.

[1] If there are no net assets of the joint estate, that is, nothing remaining after paying the expenses of properly settling the estate, the firm creditors may prove against the separate estates of the partners *pari passu* with the individual creditors; and since the firm has a claim against the partners, it cannot be said to have no assets unless there are no solvent partners. In order to come on the separate estate the joint creditors must therefore prove that there are no joint assets and no solvent partner; and may then do so. *Ex parte* Kensington, 14 Ves. 447; *In re* Lloyd, 22 F. R. 88; *In re* West, 39 F. R. 203; Harris *v.* Peabody, 73 Me. 262; Shackelford *v.* Clark, 78 Mo. 491; Ruth *v.* Lowrey, 10 Neb. 260, 264 (*semble*); Brock *v.* Bateman, 25 Oh. St. 609; Scull's Appeal, (Pa.) 7 Atl. 588; Alexander *v.* Gorman, 15 R. I. 421, 7 Atl. 243; Curtis *v.* Woodward, 58 Wis. 499, 17 N. W. 328. But see *contra*, (that even then the joint creditors cannot come on the separate assets). Warren *v.* Farmer, 100 Ind. 593; Howe *v.* Lawrence, 9 Cush. 553; *In re* Gray, 111 N. Y. 404, 18 N. E. 719 (*semble*). When any assets are left after paying the expenses of settling the estate, but are expended in the vain hope of recovering more, it seems that the firm creditors cannot come on the separate estates in competition with the separate creditors. *In re* Blumer, 12 F. R. 489.

the partnership is a petitioner for a separate commission against a bankrupt partner, — which rests there on the technical reason, that a commission of bankruptcy is at once an action and an execution. This rule has not been recognized in practice in this country, so far as we know; nor does it seem to us to be supported by any substantial reasons or principles derivable from the law of bankruptcy in relation to partnership. (*q*)

§ 385. **Effect of Insolvency of Firm on Separate Property.** — If a partner becomes bankrupt, his assignees take only his interest in the joint property. (*r*) But it seems that, if a firm is bankrupt, all the property of the firm, and also all the several property of the partners, goes to the assignees. (*s*) Practically, and in this country, this can be the case only where the partners are also insolvent, or suppose themselves insolvent, or in danger of becoming so; that is, have not enough to pay all the debts of the firm, and all their several debts also. For as the solvent partners would all be held, finally, for the debts of the firm, they would pay them without its insolvency. Indeed, while the insolvency of a partner when the firm is solvent is no uncommon circumstance, the legal insolvency of a firm of which the partners are solvent and able to pay all the joint as well as several debts is unknown in practice. It has been held, that an assignment of a firm for the benefit of creditors would be regarded as a fraudulent conveyance, unless it included all the individual estate of the partners as well as the partnership property. (*ss*) [1]

(*q*) *Ex parte* Crisp, 1 Atk. 133; *Ex parte* Hall, 9 Ves. 349; *Ex parte* Ackerman, 14 Ves. 604; *Ex parte* De Tastet, 1 Rose, 10, 17 Ves. 247. And see Murrill *v.* Neill, 8 How. 414, 427; M'Culloh *v.* Dashiell, 1 H. & G. 99; *Ex parte* Taitt, 16 Ves. 193; *Ex parte* Dewdney, 15 Ves. 499; *Ex parte* Chandler, 9 Ves. 35; *Ex parte* Crisp, Cooke's B. L. 17 Willes, 467.

(*r*) Parker *v.* Muggridge, 2 Story, 334. And subject to the same equities which affect the bankrupt or insolvent. Jewson *v.* Moulson, 2 Atk. 420; Jacobson *v.* Williams, 1 P. Wms. 382; Bosvil *v.* Brander, 1 P. Wms. 458, and Mr. Cox's note; Burdon *v.* Dean, 2 Ves. Jr. 607; Mumford *v.* Murray, 1 Paige, 620; Smith *v.* Kane, 2 Paige, 303; Van Epps *v.* Van Deusen, 4 Paige, 64. See Lothrop *v.* Wightman, 41 Pa. 297.

(*s*) Judd *v.* Gibbs, cited Hilliard on Bankr. 114; *Ex parte* Cook, 2 P. Wms. 500; *Ex parte* Bandier, 1 Atk. 98; Hague *v.* Rolleston, 4 Burr. 2174; Harrison *v.* Sterry, 5 Cranch, 239; Wharton *v.* Fisher, 2 S. & R. 178.

(*ss*) Citizens' Ins. Co. *v.* Wallis, 23 Md. 182. [See note 1.]

[1] In the absence of a bankruptcy law, the common method of securing the distribution of a debtor's assets among his creditors is by a voluntary assignment for benefit of creditors. In many States such assignments are regulated by statute; in all, they are valid at common law unless fraudulent. A question of some difficulty is presented when it becomes advisable to make an assignment of partnership property; namely, whether it is necessary to include the separate property of the partners. If a general assignment is made by the partners of all their property, both partnership and individ-

In England, by statute, joint creditors are entitled to prove under a separate commission for the purpose of voting in the choice of assignees, and assenting to, or dissenting from, the certificate. (*t*) But there is no provision enabling separate creditors to prove for this purpose under a joint commission. The law as to them, therefore, stands as it was before, which prevents them from voting in the choice of assignees under a joint commission. (*u*) When there is no statutory enactment in this country, making other provisions, we should consider the law to be as it was in England before the passage of the statute. (*uu*)

§ 386. **Rights of Secured Creditors.** — [A secured creditor cannot usually prove his entire claim in bankruptcy unless he surrenders his security. But where a partnership creditor has security which belongs to the estate of a separate partner, or an individual cred-

(*t*) Before the statute they were not so entitled (*Ex parte* Simpson, 2 Rose, 338; *Ex parte* Taitt, 16 Ves. 193, note [Sumner's ed.]; *Ex parte* Wilson, 18 Ves. 439), unless there were no separate creditors to vote. *Ex parte* Jones, 18 Ves. 283; *Ex parte* Taylor, 18 Ves. 284; *Ex parte* Laycock, 1 Rose, 32.

(*u*) *Ex parte* Parr, 18 Ves. 65, 1 Rose, 76; *Ex parte* Hamer, 1 Rose, 321; *Ex parte* Jepson, 19 Ves. 224. Upon some occasions, if the interest of the separate creditors requires it, an order will be made, that an inspector shall be appointed for the separate estates, as a check upon the proceedings of the assignees. *Ex parte* Batson, 1 Glyn & J. 269.

(*uu*) The weight of authority favors the rule that a partnership creditor may prove his claim against the estate of an individual partner, and, of course, that such provable claim will be barred by the discharge. *In re* Jewett, 15 N. B. R. 126.

dual, it is good, and the assets will be distributed as they would be in case of bankruptcy. Peters *v.* Bain, 133 U. S. 670; Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80. But see Gable *v.* Williams, 59 Md. 46.

If the separate property of all the partners is not included in the assignment, it is sometimes held that the assignment is void. Collier *v.* Hanna, 71 Md. 253, 17 Atl. 390; Cleveland *v.* Battle, 68 Tex. 111, 3 S. W. 681. In other States, however, it is held that an assignment of the partnership assets for the benefit of firm creditors is good, though the individual property of all the partners is not included. Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40; *Ex parte* Hopkins, 104 Ind. 157, 2 N. E. 587; McFarland *v.* Bate, 45 Kas. 1, 25 Pac. 238; Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83; Auley *v.* Osterman, 65 Wis. 118, 25 N. W. 657. See also Wells *v.* Ellis, 68 Cal. 243, 9 Pac. 80.

If a statute requires all the property of a debtor to be conveyed, a conveyance of partnership property alone may perhaps be bad (McFarland *v.* Bate, 45 Kas. 1, 25 Pac. 238, *semble*); and it is no doubt in the power of the legislature to require an assignment of all property, both joint and individual. But in the absence of such a statute, that rule would seem more in accordance with principle which allows an assignment of the partnership assets alone. That rule recognizes the separate existence of the firm, and its position as the real owner of its property. Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40; Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83. Nor is the opposite view consistent with the universally recognized power of a single partner to make an assignment of the firm property in the absence of his copartner (*ante*, § 110), for of course the individual property of the latter could not be included.

itor is secured out of the partnership assets, he may prove his entire claim against the estate which is indebted to him without surrendering his security; since it would not inure to the benefit of the debtor estate.[1]]

SECTION IV.

WHAT DEBTS OR FUNDS ARE JOINT, AND WHAT ARE SEVERAL.

§ 387. **Debt whether or not owed by Partnership.** — It is important to determine what creditors belong to the one class or the other, and what funds belong to the one or the other, that they may be duly appropriated.

The question, whether a party is a joint creditor or a several creditor, resolves itself into two. One question is, Was the debt, as originally contracted, the debt of the partnership, or the debt of some one partner? (*v*) This must depend altogether upon the considerations which have already been presented, as to the liability of partners and of partnerships. They determine whether a certain debt, claimed to be that of a firm, was contracted by the firm, or by one person, partner or other, having authority to bind the firm in that way to that debt. Or whether a debt, claimed to be the several debt of a partner, and, as such, entitled to priority upon the several fund, was contracted by him alone, or by him for the firm, so as to make it legally the debt of the firm. In other words, these questions depend almost wholly upon the considerations which determine the authority of one who acts for a firm, or the liability of the members of the firm. And it does

(*v*) A., as a trader, being indebted to several persons, enters into partnership with B., and brings his stock in trade into the partnership. By the partnership articles, it was agreed that the joint trade should pay the creditors of A., named in a schedule. It was held that a separate creditor of A., named in the schedule, did not, by the articles, become a joint creditor of A. and B. This was on the ground of want of assent on the part of the creditors. Lord Eldon observed: "But I agree to the proposition, that a very little will do to make out an assent to the agreement. If any of the creditors named in the schedule think they can make out such a case, they may apply, on that ground, to prove their debts against the joint estate." *Ex parte* Williams, Buck, 13.

[1] *In re* Plummer, 1 Phil. 56; Rolfe *v.* Flower, L. R. 1 P. C. 27; *Ex parte* Manchester Co., L. R. 18 Eq. 249; *In re* Holbrook, 2 Low. 259; *In re* Thomas, 17 N. B. R. 54. But see *contra*, Harmon *v.* Clark, 13 Gray, 114 (*semble*); White *v.* Dougherty, Mart. & Y. 309.

not seem necessary to add here anything to what has been already said on these subjects. (*w*)

§ 388. **Change of Nature of Debt.** — But the second of the two questions referred to is more difficult. It is whether a debt, which was originally a joint debt, has become a several debt, or whether a debt originally several has become joint. A part of this difficulty springs from the principle, that a firm is so far distinct from the members who compose it that a creditor of the firm may have the partnership and also the several security of the partners, or some of them, as sureties for the debt; and a creditor of one or more partners may have the liability of the firm as security for his debt. Hence, if a debt was originally of one kind, and the creditor can show indebtedness of the other kind for the same cause, the question may arise, whether the new indebtedness is in discharge and extinguishment of the old, or only by way of collateral security to the old. (*x*) For if after a dissolution the payee of a note of a firm gives it up, and takes the several notes of the partners for their several shares, he has no rights as a partnership creditor. (*xx*)

§ 389. **Consent and Consideration necessary.** — If the one indebtedness discharges the other, there must be, first, a consent of the creditor, and a consideration of some kind for the new indebtedness, and a consideration of some kind for the discharge of the old. (*y*) Thus, if a partner makes a purchase, on his own account, and pays for it by the note of the firm, which is all the creditor has, his possession of this note does not necessarily prove his discharge of the several partner. If he gives up the note of

(*w*) See cases cited in following note, for such further consideration of these points as may be thought necessary.

(*x*) *Ex parte* Whitmore, 3 Mont. & A. 627. This case is a leading and illustrative case; but, as questions arising under this branch of the law are largely governed by the special facts in the case, we give the principal authorities. *Ex parte* Nolte, 2 Glyn & J. 295; Thompson *v.* Percival, 5 B. & Ad. 925; Evans *v.* Drummond, 4 Esp. 89; Read *v.* White, 5 Esp. 122; Bedford *v.* Deakin, 2 Stark. 178, 2 B. & Ald. 210; Lodge *v.* Dicas, 3 B. & Ald. 611; David *v.* Ellice, 5 B. & C. 196; Kirwan *v.* Kirwan, 4 Tyrw. 491, 2 Cr. & M. 617; Winter *v.* Innes, 4 Mylne & C. 101; Vulliamy *v.* Noble, 3 Meriv. 619; Sleech's Case in Devaynes *v.* Noble, 1 Meriv. 565; *Ex parte* Kendall, 17 Ves. 514, 527; Cowell *v.* Sikes, 2 Russ. 191; Wilkinson *v.* Henderson, 1 Mylne & K. 582, 588; Braithwaite *v.* Britain, 1 Keen, 206, 220; Hart *v.* Alexander, 2 M. & W. 484; Lyth *v.* Ault & Wood, 7 Exch. 669; Harris *v.* Farwell, 15 Beav. 31; Yarnell *v.* Anderson, 14 Mo. 619; Smith *v.* Rogers, 17 Johns. 340.

(*xx*) Crooker *v.* Crooker, 52 Me. 267.

(*y*) But there must be an extinguishment of the original indebtedness. Cuxon *v.* Chadley, 3 B. & C. 591; Butterfield *v.* Hartshorn, 7 N. H. 345; Warren *v.* Batchelder, 15 N. H. 129; Wharton *v.* Walker, 4 B. & C. 163; Owen *v.* Bowen, 4 C. & P. 93; Gibson *v.* Minet, 1 C. & P. 247; McKinney *v.* Alvis, 14 Ill. 34.

the partner, that would prove it; but if there was only a simple debt of that partner, as for a purchase, the note of the firm would not be a payment of this debt. In Maine and Massachusetts, there would be a presumption of payment, to be overcome only by proof of a different intention between the parties. (*z*) In other States, and in the federal courts, the general presumption, that a negotiable note is not payment, would apply, and could be rebutted only by proof that it was otherwise intended. (*a*) That is, we should say in such a case the creditor might consider the old debt as still existing, and claim as several creditor, if that would be for his advantage, giving up the company's note. If the intention of discharging the old debt by the new was made out by proof, or by presumption, the question would still occur as to the consideration; and we should say, that the getting all the partners, instead of a part, would be a consideration enough for the discharge by the creditor of the old debt; and, at the same time, if no especial consideration to the firm were proved, we should say that the discharge of the several indebtedness of the one partner would be a sufficient giving up of value by the creditor to make a consideration on which the firm would be held (*b*)

If the debt was originally joint, and had apparently become several instead of joint, we apprehend that a distinct consent of the creditor to this arrangement, — by which he gives up all, and retains only one, — and a distinct consideration for his consent, must be proved. And this, of course, may be any benefit to him, actual or prospective; or any loss or injury to the firm, suffered at the instance of the creditor. A consideration to the several partner must, perhaps, also be proved; for, although he was held

(*z*) Butts *v.* Dean, 2 Met. 76; Watkins *v.* Hill, 8 Pick. 522; Reed *v.* Upton, 10 Pick. 525; Maneely *v.* McGee, 6 Mass. 143; Wood *v.* Bodwell, 12 Pick. 268; Ilsley *v.* Jewett, 2 Met. 168; Varner *v.* Nobleborough, 2 Me. 121 and note (*a*); Descadillas *v.* Harris, 8 Me. 298; Newall *v.* Hussey, 18 Me. 249; Bangor *v.* Warren, 34 Me. 324; Fowler *v.* Ludwig, 34 Me. 455; Shumway *v.* Reed, 34 Me. 560; Comstock *v.* Smith, 23 Me. 302; Gooding *v.* Morgan, 37 Me. 419.

(*a*) Peter *v.* Beverly, 10 Pet. 567; Sheehy *v.* Mandeville, 6 Cranch, 253; Wallace *v.* Agry, 4 Mason, 336; Smith *v.* Smith, 27 N. H. 244; Van Ostrand *v.* Reed, 1 Wend. 424; Burdick *v.* Green, 15 Johns. 247; Hughes *v.* Wheeler, 8 Cowen, 77; Booth *v.* Smith, 3 Wend. 66; Bill *v.* Porter, 9 Conn. 23; Davidson *v.* Bridgeport, 8 Conn. 472; Elliott *v.* Sleeper, 2 N. H. 525; Frisbie *v.* Larned, 21 Wend. 450; Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 Hill, 448. For the English law upon this point, see Crowe *v.* Clay, 9 Exch. 604; Maxwell *v.* Deare, 8 Moore, P. C. 363.

(*b*) *Ex parte* Williams, Buck, 16; *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Lobb, 7 Ves. 592; Scaife *v.* Jackson, 5 Dow & R. 290, 3 B. & C. 421; *Ex parte* Kedie, 2 Deac. & Ch. 321; *Ex parte* Jackson, 1 Ves. Jr. 131. And see cases in previous notes.

before, he had before, on payment, a right to charge his payment to the firm, which he has not now. (*c*)

In general, it would seem from the cases that, while a distinct intention, or consent and agreement, of all the partners must be proved, in order to give validity to an arrangement by which a new indebtedness has discharged an old one, or a joint debt been extinguished by conversion into a several debt, or *vice versâ*, — if such consent and agreement be proved, the court apply quite liberally the principle of novation, and consider the discharge of the one debt a sufficient consideration to sustain the assumption of the new debt. (*d*)

Whether or no such consent and discharge have taken place, must depend upon considerations quite analogous to those which have been presented in the inquiry when a retired partner was discharged from the liability of the firm, by change of charge, or credit, or account. The cases are rather numerous on this point; but it is not easy to draw from them any general principles other than those which have been already stated. (*e*)

(*c*) Lyth *v*. Ault & Wood, 7 Exch. 669. Parke, B.: "The plaintiff agrees to take the security of one partner, instead of that of both. She is at liberty to enter into that arrangement; for the court cannot inquire into the value of the consideration. If there be any consideration whatever, it will support an agreement. Now, although 10*l*. would be no satisfaction for a debt of 100*l*., yet an article of much less value than 10*l*. may be given and received in satisfaction of such a debt. It may, at first, appear paradoxical; but the sole responsibility of one of many partners may be of greater value than that of all, for you may thereby obtain the security of his real and personal estate." Pollock, C. B.: "The exchange may be of great advantage to the creditor; for it may be much more desirable to have the sole security of a rich old man, than the joint security of the old man, and of a young man without any property." Thompson *v*. Percival, 5 B. & Ad. 925; Hart *v*. Alexander, 2 M. & W. 484; Kirwan *v*. Kirwan, 2 Cr. & M. 617, 4 Tyrw. 491. The authority of David *v*. Ellice, 5 B. & C. 196, 7 Dow & R. 690, and Lodge *v*. Dicas, 3 B. & Ald. 611, is considered as greatly shaken by the later authorities. See Hart *v*. Alexander, 2 M. & W. 493; Sheehy *v*. Mandeville, 6 Cranch, 264; Harris *v*. Lindsay, 4 Wash. C. C. 271. But see Wildes *v*. Fessenden, 4 Met. 12, reviewing the authorities. Robb *v*. Mudge, 14 Gray, 534; Wild *v*. Dean, 3 Allen, 579; *Ex parte* Appleby, 2 Deac. 482; *Ex parte* Liddiard, 4 Deac. & Ch. 603; *Ex parte* Kedie, 2 Deac. & Ch. 312; *Ex parte* Lane, De Gex, 300; *Ex parte* Bradbury, 4 Deac. 202.

(*d*) Lyth *v*. Ault, 7 Exch. 669, *supra*, note (*c*); and the opinion of Alderson, B., p. 674. And see Andrew *v*. Boughey, Dyer, 75 *a*; Thompson *v*. Percival, 5 B. & Ad. 925; Mills *v*. Boyd, 6 Jur. 943 and cases there cited.

(*e*) Wild *v*. Dean, 5 Allen, 579. In this case, Bigelow, C. J., fully considers the conflicting authorities and holds that a partnership debt is not provable against the private estate of one of the partners, who has received an assignment of all the partnership property, and executed a bond to his retiring partner to assume and pay the partnership debts, without evidence of an express or implied assent by him to pay the same to the creditor as his private debt; and that notice by the creditor of his election to treat it as a private debt is not sufficient. Robb *v*. Mudge, 14 Gray, 534; *Ex parte* Whitmore, 3 Mont. & A. 627; Evans *v*. Drummond, 4 Esp. 89;

If there be an old indebtedness, and a new one for the same cause, and it is not proved or presumed that the new has paid the old, then both co-exist; and, generally, in such case the old is the principal debt, and the new is collateral to and security for the old. The cases show that the question whether the old debt is extinguished is sometimes one of much difficulty in practice. But, if it be not extinguished, then it is certain that the creditor may give up the new debt, and found his claim only on the old. (*f*) In this country, it is a universal principle, recognized in all our systems of insolvency and in the national bankrupt law, that a creditor having a debt with security may give up his security, and prove his whole debt; or may obtain what he can from his security, and prove for the balance. (*g*) This prin-

Read *v.* White, 5 Esp. 122; Bedford *v.* Deakin, 2 Stark. 178, 2 B. & Ald. 210; Lodge *v.* Dicas, 3 B. & Ald. 611; Thompson *v.* Percival, 5 B. & Ad. 925; Hart *v.* Alexander, 2 M. & W. 484.

(*f*) *Ex parte* Roxby, 1 Mont. on Part. 198. The petitioner, a joint creditor, took a draft of the solvent partners upon a third person. The petitioner applied to prove. The proof was refused, unless upon delivering up the draft. Petition to prove. Lord Chancellor: "The question is, whether the bill was given as a collateral security, or in discharge of the debt; as to which an affidavit must be made." *Ex parte* Hodgkinson, 1 Cooper, 101; *Ex parte* Kendall, 17 Ves. 527. Lord Eldon: "In many cases, the representative may be entitled to say to a creditor, who chooses to make the demand, that justice requires the surviving partners to pay the debt: they are to be considered the principals; he is merely a surety; and therefore a court of equity would not permit them to call upon him for payment, except upon an equitable arrangement and modification requiring them to assign the dividend." *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Lobb, 7 Ves. 592; *Ex parte* Hay, 15 Ves. 4; *Ex parte* Slater, 6 Ves. 146; Evans *v.* Drummond, 1 B. & C. 113; Reed *v.* White, 5 Esp. 122; Thompson *v.* Percival, 5 B. & Ad. 925; *Ex parte* Whitmore, 3 Mont. & A. 627; Oakeley *v.* Pasheller, 10 Bligh, 548, 4 Cl. & F. 207.

(*g*) Richardson *v.* Wyman, 4 Gray, 553. The question was before the court in this case, where the respondent held a joint and several note of three persons, tenants in common, and held also a mortgage security. The petitioners claimed that the security should first be made available, and the respondent be permitted then to prove against the insolvent estate of one of the debtors. The court said: "The property of the insolvent debtor, which is pledged for the payment of the debt, should either be applied to its extinguishment, or surrendered to the assignees and made part of the estate to be distributed among the general creditors; and whatever other property the creditor holds as security ought also to be appropriated to the payment of the debt. This is an equitable rule, which will do justice to all parties. It has the sanction, in its spirit, of the courts of chancery in England, and has been recognized and enforced in our own." Lanckton *v.* Wolcott, 6 Met. 305; Amory *v.* Francis, 16 Mass. 308; *In re* Grant, 5 Law Rep. 303; *Ex parte* Baker, 8 Law Rep. 461; Eastman *v.* Foster, 8 Met. 19. For English cases, see *Ex parte* Goodman, 3 Madd. 373; *Ex parte* Parr, 1 Rose, 76, 18 Ves. 65; *Ex parte* Bennet, 2 Atk. 527; *Ex parte* Wildman, 1 Atk. 109; *Ex parte* De Tastet, 1 Rose, 323; *Ex parte* Hedderley, 2 Mont., D. & D. 487; *Ex parte* Shepherd, 2 Mont., D. & D. 204; *Ex parte* Prescott, 4 Deac. & Ch. 23; *Ex parte* Dickson, 2 Mont. & A. 99; *Ex parte* Rufford, 1 Glyn & J. 41; Ward *v.* Dalton, 7 C. B. 643; *Ex parte* Bloxham, 6 Ves. 449, 600; *Ex parte* Barclay, 1 Glyn & J. 272; *Ex parte* Smith, 3 Bro. C. C. 46.

ciple has not been applied to the case of a creditor of a partner, holding the liability of the firm as collateral security.[1] The simplest course would be, that the creditor should prove against the firm, and, deducting his dividend, then prove for the balance against the partner; but a difficulty in the way of such procedure leads to a doubt whether it would be permitted. (*h*)

§ 390. **Proof upon Joint and Several Claim.** — We have supposed the indebtedness to be such that the liability of the firm and that of the partner cannot be called concurrent. Perhaps they would be so deemed; and if they were, in fact or by construction, such that the creditor need not consider the one as principal, and be limited in his claim in the other, as he would be in a case of strict guaranty, — then it seems to be settled in England, although not without some doubt and objection of great weight, that the creditor can only elect to proceed against one, (*i*) and abandon his claim against the other party. In fewer words, if a creditor

(*h*) Agawam Bank *v.* Morris, 4 Cush. 99. A partnership note having been indorsed by the payee to a third person, and by him indorsed to and discounted at a bank of which he was president, and one of the promisors having afterwards become insolvent, the bank proved the note as a claim against his estate. The solvent promisor afterwards, at the request of the second indorser, and for the purpose of securing him and the bank, but without the knowledge of the bank, gave him security applicable to the note in question, and also to another note held by the bank; such indorser promising to account to the promisor for the surplus of the security, if any. It was held, that the security was not given to the bank, but was a personal one to the second indorsee, and to indemnify him as such; and that a subsequent order of the commissioner, on the motion of the assignee, directing the note to be struck out of the list of claims proved, and disallowing the same, on the ground that the bank held collateral security therefor which had not been surrendered or applied, was erroneous. See also Barclay *v.* Phelps, 4 Met. 397.

(*i*) *Ex parte* Bevan, 9 Ves. 222. Lord Eldon: "It is not necessary to decide the other question as to the joint and several proof. If it was, I am not perfectly satisfied with the authority that has been stated. The reasoning goes upon this: that a joint and separate action could not be brought at law. But surely the distinction is this, that, where a joint and separate bond is given, and another security, several from each, there, as two actions might be brought, the rule in bankruptcy should be different. I think I have heard, that, in the case cited in Pearce *v.* Williams, the only separate creditor was he who took out the commission; and it appears, by the book, that the joint creditors prayed that he might deliver over to them the effects; which was refused; and it was said that he should have the effects applied to his separate bond: and, if that is the case, the rule is quite right; for he would have a right to take the separate effects, if not to the detriment of other separate creditors." And in the same case, 10 Ves. 107, Lord Eldon again says: "The principle seems obvious; yet in bankruptcy, for some reason not very intelligible, it has been said the creditor should not have the benefit of the caution which he has used. I never could see why a creditor, having both a joint and a several security, should not go against both estates. But it is settled that he must elect."

[1] *Ante*, § 386.

can elect, he must elect. The supposed analogy to a rule of law is surely insufficient for this doctrine, and it has not been established in this country.[1] Lord Eldon appears to think that, aside from authority, if a creditor gets the security of a partner, and also the security of a firm for the same debt, by a valid contract, there is no reason why he may not prove against both, in the same way as if they were different and distinct persons. (*j*)

(*j*) The case alluded to by Lord Eldon, as quoted in the previous note, is *Ex parte* Rowlandson, 3 P. Wms. 405. "The Lord Chancellor (Talbot) at first inclined to think that the petitioner, being a joint and a separate creditor, ought to be at liberty to come in under each of the commissioners, provided he received but a single satisfaction; but the next day his lordship held, that, as at law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly; and, on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other. (But, as to this, see Lechmere *v.* Fletcher, 1 Cr. & M. 636.) So, by the same reason, the petitioner in the present case ought to be put to his election under which of the two commissions he would come; and that he should not be permitted to come under both, for then he would have received more than his share." And, notwithstanding the doubts of Lord Eldon and other high authorities, the rule is now firmly established in England, that, where there is a joint and several creditor, he must make his election whether he will come in upon the joint or the separate estate; that is, which he will come in upon, in preference; for, whichever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any. *Ex parte* Blankenhagen, Cooke's B. L. 257; *Ex parte* Butlin, id.; *Ex parte* Banks, 1 Atk. 106; *Ex parte* Bond, 1 Atk. 98; *Ex parte* Smith, 1 P. Wms. 237; *Ex parte* Masson, 1 Rose, 159; *Ex parte* Liddel, 2 Rose, 34; *Ex parte* Bank of England, 2 Rose, 82; *Ex parte* Husband, 2 Glyn & J. 4, 5 Madd. 419; *Ex parte* Moult, Mont. 337; *Ex parte* Chevalier, 1 Mont. & A. 345; *Ex parte* Hinton, 1 De Gex, 550; *Ex parte* Ladbroke, 2

[1] Upon a joint and several note of the firm and the partners, that is, a note signed with the firm name and by each partner individually, proof may in this country be made against the separate estates of the partners, as well as against the joint estate. *In re* Bigelow, 3 Ben. 146; *Ex parte* Nason, 70 Me. 363; *In re* Gray's Estate, 111 N. Y. 404, 18 N. E. 719; Fowlkes *v.* Bowers, 11 Lea, 144. But see Fayette Nat. Bank *v.* Kenney, 79 Ky. 133, where it was said that the holder of the note must elect between the joint estate and the separate estates.

In the same way where the firm and a partner are parties successively liable on commercial paper (as, for instance, maker and indorser of a note), proof may be made against both estates. *In re* Farnum, 6 Law Rep. 21; Mead *v.* Nat. Bank, 6 Blatch. 180; Claflin *v.* Behr, 89 Ala. 503, 8 So. 45; Union Nat. Bank *v.* Bank of Commerce, 94 Ill. 271; Borden *v.* Cuyler, 10 Cush. 476 (*semble*). Compare however, *In re* Blumer, 13 F. R. 622, where it was held that a guaranty of a firm debt by a partner, being a guaranty of his own debt, had no meaning, and gave the other creditor no right against his separate estate.

The rule in England at common law was different, as has been stated in the text, There the holder of a joint and several obligation must elect whether to proceed against the firm or the individual partners. *Supra*, note (*i*); *Ex parte* Bevan, 10 Ves. 107; *Ex parte* Barnewall, 6 De G. M. & G. 795. See *Ex parte* Adamson, 8 Ch. D. 807 (C. A.) And the same was true as to successive parties on commercial paper, Goldsmid *v.* Cazenove, 7 H. L. Cas. 785. See Ames, Cas. on Part., p. 348, note.

§ 391. **Joint but not Partnership Creditors.** — [It has been seen[1] that joint but not partnership creditors of the partners may attach the partnership property and hold it even against partnership creditors. It would be natural to suppose that the same rule would apply in bankruptcy: and that the joint creditors of the partners would share in the partnership assets. Such appears to be the rule in England.[2] But in this country joint but not partnership creditors of the partners come, with the individual creditors, on the separate assets of the partners.[3]]

§ 392. **What Property is joint and what several.** — It is also important to determine what constitutes the fund appropriated to one class of creditors, and what that of the other class; or, to ascertain what is joint property and what is several property. Questions of fact, or even of law, as to the ownership of certain goods, or effects, or lands, are usually to be determined by the general principles of the law of contracts, or the law of property. But those which are peculiar to the law of partnership, or arise out of its relations, are also of much importance.

It seems to be held that if a partner takes property from the firm, even in good faith, and bankruptcy ensues, and the question arises, which class of creditors has the benefit of this property, it will be held to satisfy any balance due from that partner to the firm, and thus to increase the fund of the joint creditors, and the several creditors have only the surplus.[4] As a general principle, this may rest upon sufficient reasons; for a partner should not be permitted to withdraw his share from the capital stock, and in this way assist his several creditors at the expense of the joint creditors. But the principle, or the rule, should not be extended to cases in which chattels were appropriated long ago to one partner, or bought by him with money taken from the

Glyn & J. 81; *Ex parte* Bate, 3 Deac. 358; *Ex parte* Smith, 1 Deac. 385; *Ex parte* Hill, 3 Mont. & A. 175; *Ex parte* Clarke, 1 De Gex, 153; *Ex parte* Wood, 1 De Gex, 134; *Ex parte* Banks, 2 Jones & La T. 212; *Ex parte* Lane, 1 De Gex, 300; *Ex parte* Arbonin, 1 De Gex, 359; *Ex parte* Hay, 15 Ves. 4; *Ex parte* Adam, 1 Ves. & B. 493, 2 Rose, 36; *Ex parte* Bigg, 2 Rose, 37; *Ex parte* Gray, 4 Deac. & Ch. 778. But where the contract is for double security against distinct firms, though consisting of the same individuals, the creditors, if ignorant of their connection, may prove against both. *Ex parte* Bevan, 10 Ves. 109, note to Sumner's ed. And see *Ex parte* Adam, 1 Ves. & B. 493, 2 Rose, 36; *Ex parte* Bigg, 2 Rose, 37; *Ex parte* La Foret, Cooke's B. L. 251; *Ex parte* Walker, 1 Rose, 441.

1 *Ante*, § 248, note 1.

2 Hoare *v.* Oriental Bank, 2 App. Cas. 589.

3 Forsyth *v.* Woods, 11 Wall. 484; *In re* Nims, 16 Blatch. 439; *In re* Holbrook, 2 Low. 259; *Ex parte* Weston, 12 Met. 1; Dunnica *v.* Clinkscales, 73 Mo. 500; Second Nat. Bank *v.* Burt, 93 N. Y. 233; Wall *v.* Fife, 37 Pa. 394.

4 See *ante*, § 248, note 1.

firm, when the goods or money were duly charged to and allowed by him. If the rule were applied to such cases, a partner could have no several property, or it would be so mixed up with that which would be restored to the joint fund that no line of separation could be found. Indeed, it seems to be limited to those cases in which certain specific property has been taken out, which has been identified, and may be specifically restored. Even here, however, the rule must be qualified, or rather another rule substituted, which may be drawn from the true principles of the case. (*k*)

§ 393. **Effect of Appropriation of Property.** — It cannot be doubted that partners may agree in their original articles as to what property shall belong to one or another in case of dissolution; or that they may so agree subsequently to the formation of the partnership; or that they may so agree in reference to the present and immediate several ownership of articles of joint property, at any time or in any way they please; with this limitation only, that the agreement must be made in good faith, and therefore must not be made in contemplation of bankruptcy. The same power and right exist in relation to choses in action; any division or appropriation of these, by indorsement of negotiable paper, or assignment of debt, or otherwise, must be lawful and effectual, with only the same limitation. (*l*) And if a partner owns in this way, or in any other way, land or personalty, his right and interest cannot be affected by permitting the partnership to use or employ his property, upon any terms satisfactory to them, always within the limitation that the whole transaction was in perfect good faith. And the converse of all this must be equally true; that is, partners may transfer to the firm, either realty or personalty, choses in possession or choses in action, and the use or employment by a partner of the thing so owned by the

(*k*) In *Ex parte* Smith, 1 Glyn & J. 74, it was held, that if one partner be intrusted with the entire management of the partnership concern, and he withdraw moneys for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction, or wholly omits and conceals it. *Ex parte* Lodge, 1 Ves. Jr. 166; M'Cauley *v.* M'Farlane, 2 Desaus. Ch. 239; *Ex parte* Cust, 1 Cooke's B. L. 548.

(*l*) *Ex parte* Lodge, 1 Ves. Jr. 166; *Ex parte* Harris, 2 Ves. & B. 213; *Ex parte* Yonge, 3 Ves. & B. 34; *Ex parte* Reeve, 9 Ves. 589; *Ex parte* Smith, 6 Madd. 2 s. c., *semble*, 1 Glyn & J. 74. See also notes 3 and 4 to Hankay *v.* Garratt, 1 Ves. Jr. 241 (Sumner's ed.); Anderson *v.* Maltby, 4 Bro. C. C. 423, 2 Ves. Jr. 244; Parker *v.* Ramsbottom, 3 B. & C. 257; *Ex parte* Carpenter, 1 Mont. & McA. 1; *Ex parte* Peake, 1 Madd. 346; Lingen *v.* Simpson, 1 Sim. & St. 600; *Ex parte* Turner, 4 Deac. & Ch. 169, 177.

firm cannot affect the interest or diminish the rights of the firm, — always, we repeat, within the limitation of the entire honesty of this transfer and this use, and its complete independence of all bankruptcy, or expectation of bankruptcy. (*m*)

§ 394. **Claim of one Estate on the other because of Fraud.** — If, after such appropriations have taken place, bankruptcy ensues, it will raise the question of their effect. We think the true answer must be, that the question of their original validity comes first. To determine this, we must inquire whether anything of fraud, actual or constructive, entered into the transaction; was bankruptcy contemplated; or was it so near that it ought to have been contemplated; (*n*) or are there any other circumstances to indicate that the transaction was something else than an honest transfer of property, by those who had a right to transfer, to those who had a right to receive it. If the original transaction was wholly free from any taint of this kind, we cannot see any sound principle in the law of partnership, or in the law of bankruptcy, which should interfere with the consequences of the transfer. And therefore the property would remain within the joint fund, or in the several fund, accordingly as it had been placed by the transfer in one or in the other. We should express the general rule thus: If the firm and all the partners are bankrupt, no separate estate of a partner can claim against the joint estate, nor the joint estate against any separate estate, until all the creditors to whom the fund is primarily appropriated are paid

(*m*) *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Freeman, Buck, 471; *Ex parte* Peake, 1 Madd. 346, 589; *Ex parte* Fry, 1 Glyn & J. 96; Campbell *v.* Mullett, 2 Swanst. 575; *Ex parte* Williams, 11 Ves. 3; *Ex parte* Rowlandson, 1 Rose, 416; *Ex parte* Fell, 10 Ves. 347; *Ex parte* Hare, 2 Mont. & A. 478; *Ex parte* Hunter, 2 Rose, 382; *Ex parte* Jackson, 1 Ves. 131; *Ex parte* Burn, 1 Jac. & W. 378; *Ex parte* Jones, 4 M. & S. 450; *Ex parte* Yallop, 15 Ves. 60; *Ex parte* Houghton, 17 Ves. 252; Horn *v.* Baker, 9 East, 215; *Ex parte* Perry, 5 Ves. 575; *Ex parte* Watkins, 1 Mont. & McA. 57. But all the partners of an insolvent partnership cannot assign the property of the firm to pay the debts of one individual partner. Wilson *v.* Robertson, 21 N. Y. 587; Keith *v.* Fink, 47 Ill. 272. See also Nat. Bank *v.* Sprague, 20 N. J. Eq. 13. [See § 248, note 1.]

(*n*) It is the prevailing rule, conformably to the usual phraseology of bankrupt and insolvent laws, that a conveyance, in order to constitute preference, must be in actual contemplation of legal bankruptcy or insolvency. Thus, in England, it is said, that the law does not avoid a conveyance, made under circumstances in which the party may "hope that his affairs would rally and come round again." Green *v.* Bradfield, 1 C. & K. 454, per Tindal, C. J. It must be an act that not only in effect contravenes the bankrupt laws, but it must be done with intent to contravene them, and in contemplation of bankruptcy. Hilliard on Bankr. 329; Fidgeon *v.* Sharp, 1 Marsh. 198, per Gibbs, C. J.; Phœnix *v.* Ingraham, 5 Johns. 412. And see Pearsall *v.* McCartney, 28 Ala. 110; Cole *v.* Albers, 1 Gill, 412; Jones *v.* Howland, 8 Met. 377.

in full with interest. (*o*) But if any property appears in either of these estates, which has been fraudulently abstracted from any other, it must be restored; and this fraud may be constructive only, and any act would be so which violated the articles or agreement of the partners, or abstracted or appropriated property or funds by the act of one partner only, without the authority, consent, or knowledge of the others. (*p*) Whether partnership assets are subject to the exemption or homestead rights of a partner is not certain on authority. We should say, on general principles, they are not. But it might depend somewhat on the language of the statutes creating those rights. (*pp*)

§ 395. **"Statute of Reputed Ownership."** — The English "statute of reputed ownership," as it is commonly called, contains provisions which bear upon this question. (*q*) It enacts that goods which at the time of the bankruptcy are in the possession, order, and disposition of the bankrupt, as reputed owner thereof, by consent of the true owner, shall be distributable as the property

(*o*) Per Lord Loughborough, *Ex parte* Elton, 3 Ves. 242; Twiss *v.* Massey, 1 Atk. 67; *Ex parte* Cook, 2 P. Wms. 500; *Ex parte* Abell, 4 Ves. 837; *Ex parte* Clay, 6 Ves. 833; Bolton *v.* Puller, 1 B. & P. 539–545. And see *In re* Howland, L. R. 1 Ch. 421; Rolfe *v.* Flower, L. R. 1 P. C. 27.

(*p*) *In re* Lodge, 1 Ves. Jr. 165; *Ex parte* Harris, 1 Rose, 129, 437, Lord Eldon: "I take it now to be necessary, attending to the result of Lord Thurlow's decisions, *In re* Lodge, and the other cases, that, in order to establish a right of proof for the joint estate against the separate estate or for the separate estate against the joint estate, it must be made out that the money was taken improperly and fraudulently. In this sense, improperly and fraudulently, that it was taken against the contract between the parties, express or implied · or as against an individual partner, to increase his private estate. I have oftener than once expressed my confirmation of that opinion, that those circumstances would, in a legal sense, constitute fraud. Cases of this kind, however, must be decided upon their particular circumstances; and the conclusion of law as to fraud must depend upon the nature of those circumstances." *Ex parte* Smith, 1 Glyn & J. 74; *Ex parte* Watkins, 1 Mont. & McA. 57.

(*pp*) Whether a partner can claim homestead and exemption rights out of partnership assets, is a much debated and quite unsettled question. That he can, see Stewart *v.* Brown, 37 N. Y. 350; Servant *v.* Rusk, 43 Cal. 235; *In re* Richardson, 11 N. B. R. 114; Bonsall *v.* Comly, 44 Pa. 442. That he cannot, see Pond *v.* Kimball, 101 Mass. 105; Amphlett *v.* Hubbard, 29 Mich. 298; Clegg *v.* Houston, 1 Phila. 352; Wright *v.* Pratt, 31 Wis. 99; Burns *v.* Harris, 67 N. C. 140; *In re* Blodgett, 10 N. B. R. 145; Till's Case, 3 Neb. 261; Gaylord *v.* Imhoff, 26 Oh. St. 317; *In re* Brothroyd, 14 N. B. R. 323; *In re* Croft, 8 Biss. 188. A retiring partner from an insolvent firm cannot take any money with him; and if he do, and place it in a homestead, equity will take it for the benefit of the firm's creditors. *In re* Sauthoff, 16 N. B. R. 181. [See *ante*, § 252.]

(*q*) This statute, 6 Geo. 4, c. 16, § 3, provides that a fraudulent conveyance, "within this country or elsewhere," should constitute an act of bankruptcy. This language was used to meet a decision under previous statutes (Ingliss *v.* Grant, 5 T. R. 530), that a conveyance made in India by one residing there, though trading with England, could not constitute an act of bankruptcy.

of the bankrupt among his creditors. This statute was first enacted in the reign of James I., and has been confirmed by 6 Geo. 4. The statute of James was never adopted in this country, as we had no bankrupt law here until after our independence. Nor is there a similar provision in our bankrupt law. It is plain, however, that the principle of this statute is, to a considerable extent, one of common law; and its purpose is one which might in many cases be asserted by a court of equity, without any special statute. (*r*) Indeed, this principle is the same with that which holds a person as a partner who has been, with his own consent, held out as one. For such a person is so held because the creditors of the firm trusted the firm on the credit of his membership, or, in other words, trusted him; and did this by his permission and authority. (*s*) If, therefore, this person, instead of permitting himself to be held out as a partner, permits his property to be held out as the property of the firm, and as forming a part of the foundation on which its credit rests, the very same reason which held him personally in the first case, with all his property, would now hold that part of his property so permitted to appear as the property of the firm. We cannot, therefore, doubt that equity would decide such a case very much in accordance with the general purpose of this law, although we doubt whether any court would, in this country, without the direction or authorization of a statute, carry this principle so far as it has been applied in some cases, under the statute, in England. (*t*)

§ 396. **Actual Fraud not requisite.** — In the cases under this statute, (*u*) it has been repeatedly held that property passed in this

(*r*) Storrs *v.* Barker, 6 Johns. Ch. 166; Wendell *v.* Van Rensselaer, 1 Johns. Ch. 344; East India Co. *v.* Vincent, 2 Atk. 83; Hanning *v.* Ferrers, 1 Eq. Cas. Abr. 356, pl. 10; Gilbert's Eq. Cas. 83; Raw *v.* Potts, Prec. in Ch. 35; Hunsden *v.* Cheyney, 2 Vern. 150; Styles *v.* Cowper, 3 Atk. 692; Jackson *v.* Cator, 5 Ves. 688; Dann *v.* Spurrier, 7 Ves. 231; Raw *v.* Pole, 2 Vern. 239. In the application of this principle, at common law, see Pickard *v.* Sears, 6 A. & E. 469, 474; Heane *v.* Rogers, 9 B. & C. 586; Graves *v.* Key, 3 B. & Ad. 318, *a.*

(*s*) Spencer *v.* Billing, 3 Camp. 310; Parker *v.* Barker, 1 Br. & B. 9, 3 Moore, 226; *Ex parte* Langdale, 18 Ves. 301; Guidon *v.* Robson, 2 Camp. 302; Parsons *v.* Crosby, 5 Esp. 199; McIver *v.* Humble, 16 East, 174; Smith *v.* Watson, 2 B. & C. 411; Waugh *v.* Carver, 2 H. Bl. 235; De Berkom *v.* Smith, per Lord Kenyon, 1 Esp. 29.

(*t*) The cases in equity collected in our notes may perhaps go no further than to hold, that, where the real owner of the property stands by and virtually assents to its sale by the reputed owners, it is a fraud on the purchaser, and the real owner is estopped from subsequently setting up title. This would be the rule here. The principle is well stated by Chancellor Kent, in Storrs *v.* Barker, 6 Johns. Ch. 168.

(*u*) By Stat. 6 Geo. 4, ch. 16, § 72, it is enacted, "that if any bankrupt, at the

way to the creditors of the firm, although there was no imputation of fraud upon the actual owner. He may have had excellent reasons for placing his property in the possession or at the disposal of the firm: the only inquiry was, Has he done so? for, if he has, he has placed it within reach of the creditors of the firm. (*v*) We do not, however, see that at common law, or in equity, there needs to be actual fraud, any more than in the analogous case of one held personally a partner because he permits himself to be so held out. If, for any reason whatever, he permits his property to enlarge the credit of the firm, either he intends that it shall be liable for the debts contracted on that credit, or he does not. If he so intends, there is no fraud of any kind; and the law accepts his intention and will carry it into effect. If he does not so intend, then he commits a constructive fraud upon the creditors; and the law, or, if law cannot, equity, will give to those creditors the benefit of that property. (*w*)

§ 397. **Effect of Statute on Retiring Partners.** — The important consequences of the statute in England fall upon retiring partners, and especially upon retiring dormant partners, who leave their property in the possession or at the disposal of the firm. And it is obvious that these are the parties, of all others, upon

time he becomes bankrupt, shall, by consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same, for the benefit of the creditors, under the commission; provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel," &c. By section 1st of this statute, the statute 21 Jac. 1, ch. 19, is repealed; but the 11th section of the statute of James is re-enacted by the 72d section of the repealing statute, almost *in totidem verbis*. The adjudged cases, therefore, which were decided with reference to the statute of James, are equally applicable to the statute of Geo. IV.

(*v*) Horn *v.* Baker, 9 East, 218; *Ex parte* Fell, 10 Ves. 348; *Ex parte* Rowlandson, 1 Rose, 419; *Ex parte* Williams, 11 Ves. 7; *Ex parte* Enderby, 2 B. & C. 389; Jones *v.* Dwyer, 15 East, 21; *Ex parte* Smith, 3 Madd. 63, Buck, 149; Storer *v.* Hunter, 3 B. & C. 368; *Ex parte* Arbonin, 1 De Gex, 359; *Ex parte* Lawrence, 1 De Gex, 269; *Ex parte* Castle, 3 Mont. D. & D. 117; *Ex parte* Burn, I Jac. & W. 378; *Ex parte* Jones, 4 M. & S. 450, overruling *Ex parte* Yallop, 15 Ves. 60, and *Ex parte* Houghton, 17 Ves. 252. See also Robinson *v.* McDonnell, 5 M. & S. 228; Hay *v.* Fairbairn, 2 B. & Ald. 193; Monkhouse *v.* Hay, 2 Br. & B. 114; Kirkley *v.* Hodgson, 1 B. & C. 580. By the statute 6 Geo. 4, exception is now made in case of ships.

(*w*) Independently of any consideration of bankruptcy, it is a general rule of law that all secret sales and transfers of personal chattels, unaccompanied by possession, are at least *primâ facie* fraudulent and void as against creditors; since the effect of them is to enable a party to gain a false credit from the world. 1 Deacon B. L. 406; Hoffman *v.* Pitt, 5 Esp. 25; Eastwood *v.* Brown, 1 Ryan & M. 312; per Buller, J., in Hodsden *v.* Staple, 2 T. R. 697; Bamford *v.* Baron, 2 T. R. 594, note; and see Worsley *v.* De Mattos, 1 Burr. 467.

whom these consequences should fall. If a known partner retires and carries his personal credit out of the firm, but chooses to leave the credit of his property in the firm, certainly he cannot complain if they who accept this credit and act upon it are held in law to be entitled to the advantage of it. (*x*) He should, therefore, not only give such notice of his retirement as will prevent his personal liability from attaching to future contracts, but he should withdraw all his property, and thus prevent the credit of this property from so attaching. Or, if he cannot or will not so withdraw his property at once, perhaps a sufficient notice that the property so left is his, and is not left with the firm for them to trade on the credit of it, might save his property from creditors who come in after the retirement. This may be difficult; and the case of the dormant or unknown partner is still more difficult. He, it seems, may by his retirement alone, without notice, cut off his liability for future debts. He has never contributed to the firm any credit but that of his property ostensibly in their possession as their own. If he now leaves this property in their hands, he leaves with it all this credit, and it is bound to make this credit good. In such case, if he undertakes to protect his property against this risk, it would seem that he must give notice of his past relations and liabilities, and that he has terminated them by retirement, and leaves his property there for certain reasons, but not to be liable as the property of the firm. It may be doubted whether even this would save his property as against the statute, although it might be enough at common law or in equity if there were no statute. (*y*)

(*x*) *Ex parte* Chuck, 8 Bing. 469; *Ex parte* Wood, 1 De Gex, 134; *Ex parte* Gurney, 3 Mont. D. & D. 541; *Ex parte* Thomas, 3 Mont. D. & D. 40, affirming s. c. 2 Mont. D. & D. 294; *Ex parte* Hallifax, 2 Mont. D. & D. 544; Bannatyne *v.* Leader, 10 Sim. 350; *Ex parte* Heath, 4 Jur. 28; *Ex parte* Simpson, Mont. & Ch. 662; *Ex parte* Taylor, Mont. 240; *Ex parte* Dyster, 2 Rose, 256; but see Caldwell *v.* Gregory, 2 Rose, 149; Curtis *v.* Perry, 6 Ves. 747; *Ex parte* Fell, 10 Ves. 347.

(*y*) *Ex parte* Woodgate, 2 Mont. D. & D. 394. A dissolution of partnership was advertised in the Gazette, and a circular sent in the name of the dissolved firm, requesting debtors of the firm to pay their debts to one partner. It was held, that the notice was insufficient to take the debts out of the reputed ownership of the firm. The plant and stock in trade was taken possession of by the same partner, and used in his separate trade after the dissolution. It was held, that it was in his separate reputed ownership. *Ex parte* Sprague, 4 De G. M. & G. 866. And see Hunter *v.* Rice, 15 East, 100; *Ex parte* Wheeler, Buck, 25; *Ex parte* Clarkson, 4 Deac. & Ch. 56; *Ex parte* Enderby, 2 B. & C. 389; *Ex parte* Arbonin, 1 De Gex, 359; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Fell, 10 Ves. 347; *Ex parte* Williams, 11 Ves. 3; Joy *v.* Campbell, 1 Sch. & L. 328; *Ex parte* Burton, 1 Glyn & J. 207; *Ex parte* Usborne, 1 Glyn & J. 358; *Ex parte* Cooper, 1 Mont. D. & D. 358. And see further, on the effect of notice or want of notice bearing on reputed ownership, *Ex parte* Barnett, 1 De Gex, 194; *Ex parte* Wood, 3 Mont. D. & D. 314;

§ 398. **Negotiable Paper signed by Partners.** — It not unfrequently happens that persons who actually are in partnership, and in one firm, appear to the world as distinct traders, or as distinct firms, for the convenience and advantage of using the names separately upon negotiable paper. Thus, if there are three partners who call themselves so, they could use only the name of A., B., & Co. But, if not known as partners, A. may draw on B. in favor of C., and B. may accept and C. indorse, and the paper have apparently three distinct liabilities. The question then may arise, May the holder proceed against the several estates of all these persons, or only against the joint fund of their firm? (*z*) The authorities on this point are conflicting; nor do they cover the whole ground. We would state the result, however, thus: If the holder took the paper on the credit of the several names, and in ignorance of their joint interest, he certainly may prove against all the parties severally. But he may elect to proceed against the firm, or the joint fund, because what he held was in fact partnership paper. (*a*) If he took the paper knowing that these names were

Ex parte Arkwright, 3 Mont. D. & D. 129; *Ex parte* Wilkinson, 13 Sim. 475; *Ex parte* Pott, 2 Sim. 257, recognizing the rule in Williams *v.* Thorp, 2 Sim. 263; and overruling *Ex parte* Smith, 2 Sim. 357; *Ex parte* Nutting, 2 Mont. D. & D. 302; *Ex parte* Usborne, 1 Glyn & J. 358; *Ex parte* Burton, 1 Glyn. & J. 207.

(*z*) B. & G. carry on business at Manchester as commission agents, under the firm of B. & Co., G. being also a trader on his own separate account at Stockport, under the firm of J. & Co., and being likewise a partner with J. in London, trading under the firm of J. & Co., and with S. R. at Stockport, trading under the firm of S. R. B. & Co., drew two bills upon J. & Co., payable to the order of B. & Co., which J. & Co. accept, and which are afterwards indorsed by B. & Co., G. & Co., and S. R.; and of which W. & Co. became the holders for a valuable consideration, without any knowledge that G. was a partner in the house of B. & Co., or in that of J. & Co. B. & G. and J. severally became bankrupt. The judges were equally divided on the question, whether W. & Co. could prove the amount of the bills both against the joint estate of B. & G. and the separate estate of G., or whether they must elect. But it was held, by all the judges, that the amount of dividends, which had been previously declared, though not received by W. & Co., under the commission against J., must be deducted from such proof. *Ex parte* Moult, 1 Deac. & Ch. 44, Mont. 321. The question is very elaborately argued by Erskine, C. J., and Sir George Rose, that W. & Co. must elect; and, on a rehearing before the Lord Chancellor, it was so decided. 2 Deac. & Ch. 419, Mont. & B. 28.

(*a*) A. & B. were in partnership, B. being a secret partner; and A., on the partnership account, drew bills in his own name on B., which were accepted by him. It was held, on the bankruptcy of A. & B., that the holder of these bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A. & B. and the separate estate of B., but that he was entitled to prove them against the separate estates of A. & B., it was also held, that the holder, having proved against the joint estate, might, after a declaration of the dividend of the joint estate, retire from that proof, and prove against the separate estate. *Ex parte* Husband, 2 Glyn & J. 4, reversing s. c. 5 Madd. 419. The Lord Chancellor said: "The circumstances of this case are peculiar, and create some embarrassment

the names of partners, it is much more doubtful whether he can now proceed against the parties severally. There are *dicta* of great weight (*b*) in favor of his right, but little or no adjudication. We think the test would be the actual character of the paper. If this was in fact partnership paper, and the holder knew that the names were those of partners, we think he has only the right which attaches to partnership paper; and if the holder knew also that it was partnership paper, as well as that it bore the names of partners, we should be quite certain of this. If, however, the paper was not partnership paper, but the paper of one of the persons, or of one of the firms placing their names on it, then we should say that the holder could proceed against them severally, although they were partners otherwise, and he knew that they were so. (*c*)

§ 399. **Competition between Partner and Firm Creditors.** — If a firm be indebted to one of the partners it has been supposed (*d*) that this debt formed a part of the several assets of that partner, and that his several creditors might, therefore, prove against the joint fund, for that debt, in competition with the joint creditors. But that partner, if solvent, could not himself prove against the

in the application of well-known principles of the bankrupt law. It is clear, that where a party takes a bill, drawn by some members of a firm, carrying on a distinct trade, on the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors; and it is equally clear, that a person holding a joint and separate security for the same debt is in bankruptcy bound to elect. In this case, however, the bills are accepted by the dormant partner of the partnership of Isaac and Peter Blackburn, carrying on business in the name of Isaac Blackburn, and are drawn by Isaac Blackburn, in his individual name indeed, but, as I must take it on the evidence, in his name as representing the firm of the two bankrupts. It does not appear to me that this case ranges itself within that class of cases in which, contrary to the ordinary rule in bankruptcy, the holder has been allowed to pursue the contract appearing on the face of the bills, and to have double proof. But I do not think that the petitioners are concluded by anything that has passed, so as to be prevented now from withdrawing the proof against the joint estate, and being admitted as creditors on the two separate estates." See the cases cited in the following notes, for a full consideration of these questions.

(*b*) These are collected and commented on in *Ex parte* Moult, 2 Deac. & Ch. 419.

(*c*) *Ex parte* Moult, 1 Deac. & Ch. 44; Mont. 321, and s. c. 2 Deac. & Ch. 419, Mont. & B. 28; *Ex parte* Sillitoe, 1 Glyn & J. 383; *In re* Shakeshaft, Stirrup, & Salisbury, cited in Curtis *v.* Perry, 6 Ves. 743, 747; *Ex parte* Adam, 2 Rose, 36, 1 Ves. & B. 493; *Ex parte* Bigg, 2 Rose, 37; *Ex parte* Walker, 1 Rose, 441; *Ex parte* Liddel, 2 Rose, 34; *Ex parte* Husband, 5 Madd. 419, s. c. on appeal, 2 Glyn & J. 4; *Ex parte* La Forest, 1 Cooke B. L. 276; *Ex parte* Benson, 1 Cooke, 278; *Ex parte* The Bank of England, 2 Rose, 82; *Ex parte* Rowlandson, 3 P. Wms. 405; *Ex parte* Bonbonus, 3 Ves. 546; *Ex parte* Blackburn, 10 Ves. 204; *Ex parte* Bond, 1 Atk. 98; *Ex parte* Cobham, 1 Bro. Ch. 576; *Ex parte* Heyden, 1 Cooke, B. L. 254; *Ex parte* Chevalier, 1 Mont. & A. 345.

(*d*) *Ex parte* Hunter, 1 Atk. 223, per Lord Hardwicke; *Ex parte* Blake, Cooke B. L. 503.

joint fund, to the injury of the joint creditors, because he is himself liable to those creditors; and the several creditors of that partner take on his insolvency only his rights; and therefore it seems now to be settled, that they cannot prove against the joint fund, in such a case. (*e*)[1] If, on the other hand, a partner owes a balance to the firm, the joint creditors cannot, on that account,

(*e*) *Ex parte* Reeve, 9 Ves. 588; *Ex parte* Lodge & Fendal, 1 Ves. 166; *Ex parte* King, 1 Rose, 212. In *Ex parte* Reeve, Lord Eldon, in holding that, under a joint commission of bankruptcy, the right of the creditors to interest subsequent to the date of the commission, in the case of a surplus, is preferred to a debt from the separate to the joint estate; upon the principle, that neither the partnership nor the individual debtor can claim in competition with the creditors, said: "All these cases were very fully discussed by Lord Thurlow, in the case of Lodge & Fendal. Mr. Fendal was a creditor of the partnership, of himself and Lodge, for large sums advanced. They became bankrupts immediately after the formation of the partnership; and those advances formed the joint estate to be divided. There was a struggle by Fendal to be admitted a creditor for the amount of his advances as against the partnership. Lord Thurlow, after full consideration, was of opinion, that all the authorities establish this; that those who, being in partnership, are themselves, or some of them, debtors to the creditors of every class, cannot come in competition with the creditors. After their demands are liquidated finally, the partners may be creditors upon each other, but not before." M'Cauly *v.* M'Farlane, 2 Desaus. 239; *Ex parte* Burrell, Cooke B. L. 503; *Ex parte* Parker, id.; *Ex parte* Pine, id.; *Ex parte* Adams, 1 Rose, 305; *Ex parte* Harris, 1 Rose, 438; *Ex parte* Sillitoe, 1 Glyn & J. 382; *Ex parte* Ogle, Mont. 350; *Ex parte* Yonge, 3 Ves. & B. 34, 2 Rose, 44; *Ex parte* Batson, Cooke B. L. 503; *Ex parte* Grill, id.

[1] It is a general rule that by no form of claim can one partner compete with the partnership creditors in the division of the joint assets. Edison Electric Illuminating Co. *v.* De Mott, (N. J.) 25 Atl. 952. Hence where a bankrupt firm is indebted to a bankrupt partner the assignee of the latter cannot prove against the joint estate. *In re* Rieser, 19 Hun, 202. And where a partner dies his representative cannot prove against the firm, if it is bankrupt, a sum which was due to the deceased from the firm, so as to compete with the firm creditors. *Ex parte* Blythe, 16 Ch. D. 620; Banks *v.* Steele, 27 Neb. 138, 42 N. W. 883. So if upon the partner's death the survivors continued business and became bankrupt, the representative of the deceased could not prove if creditors of the old firm had proved. *Ex parte* Blythe, 16 Ch. D. 620. If no creditors of the old firm had proved, the representative of the deceased partner might do so; but his proof would be postponed if a creditor of the old firm afterwards proved. *Ex parte* Andrews, 25 Ch. D. 505 (C. A.). And if all the debts of creditors of the old firm are barred by the statute of limitations, the former partner or his representative may prove. *In re* Hepburn, 14 Q. B. D. 394.

Where the former partner took a note of the new firm for his claim, and while the firm was solvent surrendered the note and had a new one made to his daughter, who in good faith indorsed to A, the latter could prove; though it seems that he could not have done so if he had been an indorsee of the original note to the partner. Parsons *v.* Tillman, 95 Ind. 452. A statute which provided that a married woman should not prove against her husband in bankruptcy in competition with his creditors, was held not to apply in a case where a woman lent money to a partnership of which her husband was a member; and she was allowed to prove with the other creditors. *In re* Tuff, 19 Q. B. D. 88.

prove against his several fund, provided the balance or debt against the partner arose from lawful transactions; but it seems that, if this balance was caused by a fraudulent or surreptitious withdrawal by the partner of something from the joint fund, this should be restored to that fund, for the benefit of the joint creditors.[1] So, if the joint estate is larger at the time of bankruptcy, by any fraudulent act against one partner, his several creditors may, it is said, proceed against the joint estate, for that amount. (*f*)

§ 400. **Dormant Partners.** — If there be dormant partners, creditors who dealt in partnership business with the ostensible partners, without any knowledge of the dormant partners, may, upon discovery, elect whether to proceed against the ostensible partners alone, or against the joint fund of the actual partnership. (*g*) But it would seem that the rule in equity, above referred to, that one who may choose between two funds shall not, by such choice, injure one who has no choice, here comes in; and that, if such creditors elect to prove against the separate estate of the ostensible partners, several creditors of the ostensible partners, who could not proceed against the joint fund, may now proceed against it for an equivalent amount. (*h*)

(*f*) *Ex parte* Smith, 1 Glyn & J. 74; 6 Madd. 2; *Ex parte* Cust, Cooke B. L. 506; *Ex parte* Harris, 2 Ves. & B. 214, 1 Rose, 129, 437; *Ex parte* Watkins, 1 Mont. & McA. 57; *Ex parte* Yonge, 3 Ves. & B. 31, 2 Rose, 40; *Ex parte* Reid, 2 Rose, 84.

(*g*) *Ex parte* Reid, 2 Rose, 84; *Ex parte* Norfolk, 19 Ves. 458; *Ex parte* Watson, 19 Ves. 459; *Ex parte* Hamper, 17 Ves. 403; Binford *v.* Dormnett, 4 Ves. 434; *Ex parte* Matthews, 3 Ves. & B. 125; *Ex parte* Hodgkinson, Cooper, 101. As to the conflicting rights of joint and separate creditors, in cases of partnerships having a dormant partner, see French *v.* Chase, 6 Me. 166; Lord *v.* Baldwin, 6 Pick. 348; Cammack *v.* Johnson, 1 Green Ch. 164; Witter *v.* Richards, 10 Conn. 37. It is in the option of a firm, suing as plaintiffs, either to join the dormant partner in the suit or omit him; as, in the corresponding case of the firm being sued as defendants, it is at the option of the plaintiff to join the dormant partner or not; and the joinder or nonjoinder will not constitute any objection to the maintenance of the suit. Skinner *v.* Stocks, 4 B. & Ald. 437; Lloyd *v.* Archbowle, 2 Taunt. 324; Brassington *v.* Ault, 2 Bing. 177; Wilson *v.* Wallace, 8 S. & R. 55; Clarkson *v.* Carter, 3 Cowen, 85; Boardman *v.* Keeler, 2 Vt. 65; Lord *v.* Baldwin, 6 Pick. 348; Alexander *v.* Barker, 2 Cr. & J. 133; Cothay *v.* Fennell, 10 B. & C. 671.

(*h*) B. & S. were in partnership together; the latter being a dormant partner. A joint commission issued against them. B.'s separate estate was very considerable; the joint creditors, therefore, availing themselves of their right to resort either to the visible and the dormant partner, or to the visible partner only, adopted the latter alternative, and proved their debt against B.'s separate estate. The consequence of this was, that B.'s separate estate, which would have sufficed for the payment of all the separate creditors in full, was, by the access of the joint credit-

[1] *Ante*, § 378, note 1.

§ 401. **Distinct Firms with Common Partners.** — We have before considered the case of parties who are actually partners, but do not appear as such. If, however, they do not seem to constitute two distinct firms, but do so actually, — as, for example, if, out of four who are partners for one kind of business, two are partners in another entirely distinct business, and these two firms deal with each other, — there may be proof by one against the other, or by the creditors of either against its own fund, in the same way as if the two firms were formed of different persons. (*i*)

§ 402. **Partners' Priority in Firm Assets over Separate Creditors.** — While solvent partners cannot prove against the joint fund to the prejudice of joint creditors, because they are liable to those creditors, (*j*) they may prove against the joint fund, in competition with the several creditors, to whom they are not liable. (*k*)

ors, apportioned in a dividend of seven shillings, in the pound; while the joint estate of B. & S., exonerated of its proper claimants, produced a surplus. On application of B.'s separate creditors, it was held, that they had a lien upon that surplus to the extent which their funds had been diminished by the resort of the joint creditors. *Ex parte* Reid, 2 Rose, 84.

(*i*) *In re* Richardson, 5 L. J. Ch. 129; *Ex parte* St. Barbe, 11 Ves. 413; *Ex parte* Sillitoe, 1 Glyn & J. 374; *Ex parte* King, Cooke B. L. 534; *Ex parte* Johns, Cooke B. L. 534; *Ex parte* Hesham, 1 Rose, 146; *Ex parte* Adams, 1 Rose, 305. *In re* Shakeshaft, cited in 6 Ves. 123, 747, and in 11 Ves. 413. In this last case, Lord Eldon said: "In the case of Shakeshaft, Stirrup & Salisbury, Lord Thurlow went upon this distinction: that where there is only one partnership arranging different concerns belonging to them all, in different ways, for the benefit of different parts of that joint concern, as in that instance, the three persons carrying on the business of cotton manufacturers in Lancashire, and two of them in London, there could not be proof by the three against the two; but if the trades be perfectly distinct, then the three as cotton manufacturers in Lancashire might be creditors upon the separate concern of the two as ironmongers in London." *Ex parte* Freeman, Cooke B. L. 534; *Ex parte* Castell, 2 Glyn & J. 124; *Ex parte* Brenchley, 2 Glyn & J. 127; *Ex parte* Stroud, 2 Glyn & J. 127; *Ex parte* Cook, Mont. 228. For the limitations on this doctrine, see *Ex parte* Hargreaves, 1 Cox, 440.

(*j*) *Ex parte* Adams, 1 Rose, 305. A. lends a sum of money to one partner, on his own security, who lends the same to the partnership trade. A joint commission is taken out. A. shall not come in as a creditor upon the joint estate of the bankrupts directly, with the rest of the partnership creditors; but by way of circuity, he is entitled, as standing in the place of that partner who has paid the money to the use of the partnership trade. *Ex parte* Hunter, 1 Atk. 223. And see *Ex parte* Ellis, 2 Glyn & J. 312; *Ex parte* Carter, 2 Glyn & J. 233; *Ex parte* Reeve, 9 Ves. 589; *Ex parte* Ogle, Mont. 351; *Ex parte* Burrell, Cooke B. L. 505; *Ex parte* Broome, 1 Rose, 69; *Ex parte* Rawson, Jac. 277; *Ex parte* Robinson, 4 Deac. & Ch. 499.

(*k*) *Ex parte* Adams, 1 Rose, 305; *Ex parte* King, 17 Ves. 115; *Ex parte* Torrell, Buck, 345; Goss *v.* Dufresnoy, Davies B. L. 371; *Ex parte* Hunter, 1 Atk. 225; *Ex parte* Batson, 2 Ca. Ch. 139, 166; Craven *v.* Knight, 2 Chan. 226; *Ex parte* Taylor, 2 Rose, 175; *Ex parte* Ogilvy, 2 Rose, 177, 3 Ves. & B. 133; *Ex parte* Watson, 4 Madd. 477, Buck, 449, 492; *Ex parte* Willock, 2 Rose, 392; Wood *v.* Dodgson, 2 M. & S. 195; Aflalo *v.* Fourdrinier, 6 Bing. 309; Butcher *v.* Forman, 6 Hill, 583.

Indeed, their rights are prior to those of the several creditors; for those creditors can have the right of their debtor to the joint fund only after all claims upon it are satisfied, and, among these, the claims of the other partners. On this point, it must be the general rule, applicable to all partnerships, whether they be general or confined to a particular business or a particular transaction, and, indeed, to all joint adventures and enterprises of every kind, that they must be first settled, and the mutual claims and balances of the copartners or coadventurers be adjusted, before the divisible surplus is ascertained; and then the right of each one is only to his share of this surplus, and the creditors of each one can reach and acquire only his right. It follows, therefore, that the several creditors of each one will be postponed, so far as the joint assets go, not only to the joint creditors, but to the claims of the coadventurers for balances due from their companions, arising out of the adventure. (*l*)

If any such adventures, contracts, or enterprises are outstanding at the time of the bankruptcy, the assignees must wait until they are concluded and adjusted, and then take the share or interest of their bankrupt in the result. (*m*) The assignees are also

(*l*) West *v.* Skip, 1 Ves. 142; *Ex parte* Ruffin, 6 Ves. 119 (Sumner's ed.) note (*a*). Upon a dissolution of the partnership, each partner has a lien upon the partnership effects, as well for his indemnity as for his proportion of the surplus. But creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partnership assenting to the payment of the partnership debts. 3 Kent, Comm. (5th ed.) 65; Campbell *v.* Mullett, 2 Swanst. 608, 610; *Ex parte* Harris, 1 Madd. 583; Murray *v.* Murray, 5 Johns. Ch. 60; Woddrop *v.* Ward, 3 Desaus. 203; Bell *v.* Newman, 5 S. & R. 78; Doner *v.* Stauffer, 1 Pen. & W. 198; White *v.* Union Ins. Co., 1 N. & McC. 557; Ridgley *v.* Carey, 4 H. & McH. 167; M'Culloh *v.* Dashiell, 1 H. & G. 96; Hoxie *v.* Carr, 1 Sumn. 181; Conwell *v.* Sandidge, 8 Dana, 278; *Ex parte* Williams, 11 Ves. 5; Holderness *v.* Shackels, 8 B. & C. 612; Hodges *v.* Holman, 1 Dana, 53; Pierce *v.* Tiernan, 10 G. & J. 253; Sumner *v.* Hampson, 8 Ohio, 328; Bradford *v.* Kimberley, 3 Johns. Ch. 431; Parker *v.* Muggridge, 2 Story, 347; Payne *v.* Matthews, 6 Paige, 19. The lien of partners upon the whole funds of the partnership, for the balance finally due to them respectively, seems incapable of being enforced in any other manner than by a court of equity, through the instrumentality of a sale. The creditors of the partnership have a preference to have their debts paid out of the partnership funds before the private creditors of either of the partners. But this preference is, at law, generally disregarded; in equity, it is worked out through the equity of the partners over the whole funds. 1 Story, Eq. Jur. § 675; Commercial Bank *v.* Wilkins, 9 Me. 28; Freeman *v.* Stewart, 41 Miss. 138. [See *ante*, § 246 *et seq.*]

Upon the same principle the debt of a firm, which has advanced money to an individual member beyond his share of the capital, is a separate debt of the firm as against the partner receiving the same; and the assignee of the firm may prove the debt against the separate debtor partner, and be paid after the other separate copartnership creditors are paid, but not before. *In re* McLean, 15 N. B. R. 333.

(*m*) French *v.* Fenn, 1 Cooke B. L. 536; 3 Doug. 257; Jackson *v.* Sedgwick, 1 Swanst. 468; Brown *v.* Litton, 1 P.

entitled to claim unpaid instalments due from a solvent partner, for his admission into the partnership, because these form a part of the joint fund. (*n*)

§ 403. **Foreign Bankruptcy.** — Nor is the interest of partners in a foreign enterprise lost by seizure of the goods there, provided they, or any part of them, be restored. Thus, if there be three partners, two citizens of one country, and one of another, — and between these countries war breaks out, and property of the partnership is seized in the country of the one as property of aliens, but the share therein of that one is restored to him, the other partners are entitled, on settlement, to a share of the property restored, in the same way as if it were restored to the partnership; and, if insolvent, their assignees take that share. (*o*) A foreign government may, however, make a gift to their own citizen; and it has been said, that if the government choose to make, or cause to be made, a compensation in money to their citizen, instead of a restitution *in solido*, this will be held to be a gift, in which the copartners have no interest. And this would be especially true if there were an express exclusion of the aliens. Of course, the joint creditors could not prove against funds thus made several. (*p*)

Wms. 140; Smith *v.* De Silva, Cowp. 469. The assignees under a separate commission take only such undivided interest or share as the bankrupt himself had, and in the same manner as he held it. Holderness *v.* Shackels, 8 B. & C. 618. See also Wilson *v.* Greenwood, 1 Swanst. 471, 481, n.; Hammond *v.* Douglas, 5 Ves. 539; Crawshay *v.* Collins, 15 Ves. 218; Hill *v.* Burnham, cited id.; Brown *v.* Vider, 15 Ves. 223, 2 Russ. 340; Brown *v.* De Tastet, Jac. 284; Fearns *v.* Young, 9 Ves. 549; Wedderburn *v.* Wedderburn, 4 Mylne & C. 53.

(*n*) Akhurst *v.* Jackson, 1 Swanst. 85, 1 Wilson, 47.

(*o*) Thompson *v.* Ryan, cited in Campbell *v.* Mullett, 2 Swanst. 565, n., 577, And see, as to the effect of war upon partnership, Griswold *v.* Waddington, 16 Johns. 438, and authorities there cited.

(*p*) Campbell *v.* Mullett, 2 Swanst. 551. Two American citizens residing at Baltimore, and a French subject residing at St. Domingo, being in partnership, and owners of certain ships captured by British cruisers, and the commissioners appointed under the seventh article of the treaty of commerce, concluded in 1794, between England and America, for awarding compensations to American subjects who had suffered losses by capture, for which they could obtain no redress in the ordinary tribunals, having awarded, in compensation of the ships of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen as an alien enemy, the sums so awarded are not partnership property, and the creditors of the partnership have no claim on them, as against the separate creditors of the Americans. In this case, the following distinction is made by Sir Thomas Plumer, Master of the Rolls, in delivering judgment: "If the very joint stock, or a part of it, as in Thompson *v.* Ryan, had been restored, there would have been nothing to alter the property: the goods are returned *in statu quo*, the property of the partners. But here the ships are gone, and never restored, and the question concerns a new property come to the two, in the way of compensation. That is far removed from a case of restitution.

The English Court of Admiralty has refused to assist the assignees of a bankrupt in obtaining his share of property restored *in solido*. But we think this arose from a limitation of the admiralty power in England, which does not exist here. (*q*)

§ 404. **Right of Assignee to continue Business.** — It has been repeatedly said, that, if a partner becomes insolvent, the accounts of a firm should be closed, and the assignees should not continue the trade and business, nor permit a continuance of it without settlement. (*r*) But that may not be a positive and universal rule; nor can the solvent partners resist a bill by the assignees for a share in the profits of a subsequent trading, on the ground that the assignees did not require an immediate settlement, because it is no more the duty of the assignees to require this than it is the duty of the solvent partners to make it. (*s*) Where a

Restitution might have been made, if it were still joint property; compensation considers only the individual shares, and gives in the proportion of their interests individually to the two. There is no more ground for admitting the joint creditors than the French partner." During the argument, the Master of the Rolls put the query, "If a partnership sustained an accidental loss, as by fire, and an individual made a donation to two of the partners, in compensation of their loss, would that be partnership property?" And see Larazzabel *v.* Gorbea, cited 2 Swanst. 572.

(*q*) The Jefferson, 1 C. Rob. 325. Sir W. Scott, indeed, in his judgment, expressly says, after the decree for restitution had been passed: "The question is, whether the court shall proceed again to make a severance between these parties? I cannot think that I have the power to do that. All the severance that was necessary in this case to determine the national character of the parties has been already made: restitution stands decreed to this house. I am *functus officio*, and I shall not begin again at the prayer of the assignees, who now suggest that one of the partners is likewise an English merchant and a bankrupt. They must resort to some other authority to make the discrimination between this American partnership stock, for the purpose of subjecting a particular share to a British bankruptcy. It is no part of the duty of the Court of Admiralty to do this, and I dismiss the petition." See 2 Pars. Mar. Law. b. 3, on the law and jurisdiction of admiralty in America.

(*r*) Crawshay *v.* Collins, 15 Ves. 218, 227; Regden *v.* Pierce, 6 Madd. 353; Fereday *v.* Wightwick, 1 Tamlyn, 261; 3 Kent Comm. 64; 2 Bell Comm. 632; Story on Part. § 350; Gow on Part. 234; Collyer on Part. b. 2, ch. 2, § 2, pp. 146, 147.

(*s*) Crawshay *v.* Collins, 15 Ves. 228, per Lord Eldon: "It is said a duty was imposed upon the assignees to call for the account. That is true. It is farther urged that they could not be traders in new adventures. This also is, in a sense, true; but the proposition would be rash, that there can be no case in which they could trade with consent of the creditors, or of the creditors and the bankrupt together. If they had the consent of all persons interested, I do not know that other persons with whom they might deal could make the objection. The duty is not as between them and the other persons, who are not properly to be termed remaining or surviving partners; the destruction of one being, unless it is otherwise provided, a dissolution of the whole partnership, — as if by effluxion of time, or by death, — except as it may be reasoned upon the effect in bankruptcy of the substitution of assignees. It is, however, no more the duty of the assignees to settle with the others, than it is their duty to settle with the assignees."

deceased partner's estate was insolvent, and the administrators had permitted the surviving partners to sell the stock in the usual course of trade for the business benefit, and a loss occurred, they were not held responsible therefor. (*t*) But, on the other hand, if administrators put assets, which they have in their own hands, into the hands and possession of the surviving partners to trade with, and a loss occurs, for this they will be held responsible. (*u*)

§ 405. **Sale of the Effects in Bankruptcy.** — If there be a bankruptcy of the whole firm, it is very seldom that any other mode of settlement is resorted to, but a sale of the property. (*v*) And this is so usual, and recommended by so many obvious considerations, that assignees must not only have an unquestionable power to take this course, but would, perhaps, find it difficult to explain and justify any other course. (*w*) In one case, where creditors called upon the English court of chancery to restrain the assignees from a proposed sale of the bankrupt's effects, alleging suspicious circumstances as to the manner of the sale, Lord Eldon refused to interfere, on the ground that the assignees were acting in a matter peculiarly within their power and at their discretion, and the court must recognize them as the best judges of the propriety and expediency and manner of a sale; and that the assignees must abide their own responsibility for what they did in this matter. (*x*)

The question comes up in a different form when a part only of the partners are bankrupt, and the residue solvent. There the assignees take all the interest and rights of the bankrupt, but take them subject to the solvent partner's rights. (*y*) We should say, therefore, that they had no right, as a matter of course, to require a sale. (*z*) Usually, there is no sale; but the solvent partners settle up the concern so far as to ascertain the value of

(*t*) Thompson *v.* Brown, 4 Johns. Ch. 619. And see Shepherd *v.* Towgood, Turner & R. 379; Reed *v.* Norris, 2 Mylne & C. 361; Jennison *v.* Hapgood, 7 Pick. 1; Sweet *v.* Jacocks, 6 Paige, 355.

(*u*) Thompson *v.* Brown, 4 Johns. Ch. 619. And see Barker *v.* Parker, 1 T. R. 295; *Ex parte* Garland, 10 Ves. 119; *Ex parte* Richardson, Buck, 209; Wightman *v.* Townroe, 1 M. & S. 412; Viner *v.* Cadell, 3 Esp. 90.

(*v*) Eden B. L. 215; *Ex parte* Gering, 1 Ves. Jr. 168; *Ex parte* Hughes, 6 Ves. 617, 622; Regden *v.* Pierce, 6 Madd. 353; Fereday *v.* Wightwick, 1 Tamlyn, 261.

(*w*) But if, in the exercise of a sound discretion, a court of equity is satisfied that a postponement of a sale is for the general benefit of the creditors, it will be so ordered. *Ex parte* Kendall, 17 Ves. 519; *Ex parte* Grosvenor, 14 Ves. 589.

(*x*) *Ex parte* Montgomery, 1 Glyn & J. 341. Ordinarily, on a dissolution, from whatever cause, there must be a sale. Dickinson *v.* Dickinson, 29 Conn. 601.

(*y*) Taylor *v.* Fields, 4 Ves. 396, 15 Ves. 559, n.; Barker *v.* Goodair, 11 Ves. 85; Dutton *v.* Morrison, 17 Ves. 209; Holderness *v.* Shackels, 8 B. & C. 618.

(*z*) Allen *v.* Kilbre, 4 Madd. 464; *Ex parte* Figes, 1 Glyn & J. 122. But see *Ex parte* Montgomery, 1 Glyn & J. 338.

the bankrupt's interest, and this they pay to the assignees. And sometimes they give security to the assignees that they will, without delay, settle the concern, and ascertain and pay over the bankrupt's share. (*a*) That the assignees may have an account, is certain; and the court would always decree a sale where the assignees requested it for good cause, and perhaps it may be said that any decided advantage to the estate of the bankrupt would be deemed good and sufficient cause. (*b*)

(*a*) In Nerot *v.* Burnand, 2 Russ. 56, pending an appeal against a decree declaring a partnership dissolved and directing the property to be sold, and an account, the court upon motion suspended the sale upon the terms of bringing title-deeds into the master's office, and giving security for the value of the effects.

(*b*) Crawshay *v.* Maule, 15 Ves. 218; Gow on Part. 234; Lingen *v.* Simpson, 1 Sim. & St. 600; Featherstonhaugh *v.* Fenwick, 17 Ves. 309; Fereday *v.* Wightwick, 1 Tamlyn, 261; Regden *v.* Pierce, 6 Madd. 353; Cook *v.* Collingridge, 1 Jacob, 607; Evans *v.* Evans, 9 Paige, 178.

CHAPTER XVI.

OF AN ACCOUNT.

SECTION I.

WHEN AN ACCOUNT WILL BE ORDERED.

§ 406. **Right to an Account.** — We have been obliged to anticipate many remarks about the taking of an account, when treating other topics; especially the various modes of dissolution, and its consequences. The right to demand an account is almost, but not quite, peculiar to partners and their representatives.[1] In deciding one case, (*a*) Lord Eldon seemed to think that the having a

(*a*) *Ex parte* Hamper, 17 Ves. 412. And see Katsch *v.* Shenck, 13 Jur. 668. By a memorandum in writing, the defendant, a general merchant, agreed with the plaintiff, in consideration of the general services in business of the latter, to allow him, in addition to a fixed salary, one-fifth of the net profits on all new business entered into through him; *semble*, a partnership was thereby constituted between the parties; and held, that, at any rate, the plaintiff thereby acquired a right, as against the defendant, to an account of profits, and the appointment of a receiver. The Vice-Chancellor: "It strikes me, that by the agreement the plaintiff has become a partner; and there is a failure of evidence to show that, notwithstanding the words of the agreement, there was subjoined any stipulation that the plaintiff should not be taken as a partner; without further entering into the question, as between the plaintiff and defendant, there is an interest created in the plaintiff to know what is the amount of profits, and therefore an interest to see that those things out of which the profits arise are properly disposed of, which is, in itself, very like a partnership interest. I think, on principle, a receiver ought to be appointed." See Salter *v.* Ham, 31 N. Y. 321; Collyer *v.* Collyer, 38 Pa. 257.

[1] It is clear that the right of a partner to an account is a legal, not an equitable right; and that the jurisdiction of equity depends upon the fact that the legal action of account is obsolete and useless. Equitable relief is not discretionary. This seems to have been overlooked by the court in the case of Kinney *v.* Robinson, 66 Mich. 113, 33 N. W. 172. This was a bill for an account. An order had been entered that either partner might dispose of the assets at cost upon filing a bond. The plaintiff took the assets without filing a bond, and disposed of them below cost; but the accounting showed him to be a creditor of the firm to the amount of $2000. The court held (Sherwood, J., dissenting) that having refused to do equity, he could not call upon equity to help him; and declined to grant a decree that he should be paid the amount. Perhaps they would have allowed him an action at law against his copartner; yet equity would seem better able to adjust the rights of the parties.

right to an account was a good test of the relation of partner; that is, if one by agreement acquires a right to an account, this will make him a partner. We should prefer saying that partnership is a good test for the right to an account; and that the first inquiry must be, whether a man is a partner; for though one may have a right to an account who is not a partner, (*aa*) if he is a partner, the conclusion follows, that he has a right to an account. This right he may transfer; for not only do all partners possess this right, but it is one among those rights which originates in or arises out of a partnership, and yet which a partner transfers to his representatives, whether they be executors or administrators, assignees in bankruptcy, execution creditors, or transferees, although they do not thereby become partners. Every one of these, and every other party who has acquired the partner's interest in the joint fund, may call for an account, in order to settle and determine what that interest is. (*b*)[1]

(*aa*) One compensated by a share of the profits may have an account, though not a partner. The right to an account is not a conclusive test of partnership. *Ante*, § 53, note.

(*b*) In Crawshay *v.* Collins, 2 Russ. 342, Lord Eldon says: "A partnership may expire by death, or by effluxion of time, or by notice, or by the bankruptcy of a partner; but, in all these cases, though, in a certain sense of the word *expiration*, a partnership does so expire in each and every one of them, yet, in most instances, a partnership does not and cannot then expire as to all purposes. In some, it may not expire for years after the period in which, in one sense of the word, we say it does expire; and it must depend upon the nature of the partnership, in what way it is to be carried on during the period in which it is to be wound up. If it expires by bankruptcy, there are introduced into it, as persons interested in the manner of winding it up, the assignees of the bankrupt. If it expires by death, there are introduced, in like manner, the executors of the deceased partner; who may be stated, though certainly not in a very correct use of the term, to be a sort of assignees of the deceased partner. When it expires by notice, it may happen that in many cases the party who gave the notice may die long before the time arrives when it may be said to be quite dissolved, and his executors may become partners in the concern. In short, in every species of dissolution which may take place, in different events persons in the course of time may be introduced into the partnership, with reference to whom accounts must be settled much in the same manner as it would have been necessary to have settled them with the original partners." See Bailey *v.* Moore, 25 Ill. 347. See, as to what interest gives a right to an account, Moffat *v.* Moffat, 10 Bosw. 468. Even a member of a firm organized for the purpose of hindering and delaying creditors of a prior firm may have an account. Harvey *v.* Varney, 98 Mass. 118.

Where after dissolution the respective partners continue in settlement of the affairs of the partnership, the statute of limitation begins to run against the right of either to an account from the others, from the date of the last transaction, receipt, or payment by either, and no demand is necessary before suit. McClung *v.* Capehart, 24 Minn. 17, 1 N. W. 123.

[1] Thus, a sub-partner, so-called, has a right to an account. Nirdlinger *v.* Bernheimer, 133 N. Y. 45, 30 N. E. 561. As to the right of an employee paid by a share of the profits, see *ante*, § 53, note.

§ 407. **Duty to keep Accounts.** — It is partly as a consequence of this universal and important right, that all partners, having any charge of the business of the firm, are bound to keep constantly, regular, intelligible, and accurate accounts of all the business, and to give all the partners at all times access to them, and to the means of verifying them. And if they, for any considerable time, disregard and refuse to perform this duty, a court of equity will coerce them to its full discharge. (*c*)

It is possible that for a breach of this duty, especially where there was an express contract to perform it, an injured party might have redress at law; but he can compel the performance, and, generally, find a remedy for the ill consequence of a non-performance, only in equity. But this court has full power in the premises, and usually acknowledges the right to an account of any partner, or representatives of a partner, unless it is obviously unnecessary, and requested for frivolous reasons, or with malicious intent. (*d*)

(*c*) Rowe *v.* Wood, 2 Jac. & W. 358, per Lord Eldon: "One partner cannot exclude another from an equal management of the concern; and it is the duty of each to keep precise accounts, and to have them always ready for inspection, and, in short, to keep good faith towards each other. I think that the plaintiff, subject to the equities which may be ultimately declared between the parties, has a clear right to insist that regular accounts shall be kept of all receipts, payments, transactions, and so on, relative to the mine, and to have constant access for the purpose of inspecting the accounts; and also, that, subject to those equities, he has a clear right to control the working of the mines, and if he is impeded in the exercise of any of these rights, let him come to the court again. The application, after the other parties have been apprised of what the court expects them to do, will be differently treated." Beacham *v.* Eckford, 2 Sandf. Ch. 116. See Tyng *v.* Thayer, 8 Allen, 391.

(*d*) Smith's Merc. Law (5th ed.), 35; Marshall *v.* Colman, 2 Jac. & W. 266. Where plaintiff has an adequate remedy at law by action of account, it is held, in Connecticut, that chancery has no jurisdiction. Stannard *v.* Whittlesey, 9 Conn. 556. It has also been held in Connecticut, that no action at law will lie for the settlement of a partnership account, where the number of partners exceeds two; the remedy is in equity. Beach *v.* Hotchkiss, 2 Conn. 425. But it is otherwise in Pennsylvania. Whelen *v.* Watmough, 15 S. & R. 153; Griffith *v.* Wilbing, 3 Binn. 317; Brightly Eq. Jur. §§ 121, 122, 123; Adams Eq. 225; 1 Story Eq. § 449. And see Bracken *v.* Kennedy, 4 Ill. 558; Gillett *v.* Hall, 13 Conn. 426; Cunningham *v.* Littlefield, 1 Edw. Ch. 104. Partners cannot sue one another at law for any of the business or undertakings of the partnership. This can only be done in chancery, by asking a dissolution and an account. Stone *v.* Fouse, 3 Cal. 294; Nugent *v.* Locke, 4 Cal. 320; Wilson *v.* Lassen, 5 Cal. 116; Barnstead *v.* Empire Min. Co., 5 Cal. 299. On the action of account at law, see 3 Steph. Bl. 532; Foster *v.* Allanson, 2 T. R. 479; Jackson *v.* Stopherd, 4 Tyrw. 330; Elgie *v.* Webster, 5 M. & W. 518; Brown *v.* Tapscott, 6 M. & W. 119. It has been held, that partners may sue each other at law for a breach of any distinct engagement in the partnership agreement, and that generally adequate relief can in such case be obtained. Where this can be done, equity will not interfere. Kinloch *v.* Hamlin, 2 Hill Ch. 19; Duncan *v.* Lyon, 3 Johns. Ch. 360; Hunt *v.* Gookin, 6 Vt. 462. But where two persons enter into a partnership as to

§ 408. **Account necessary upon Dissolution.** — Whenever there is a dissolution of a partnership, for any cause, it would seem that there must be an account, if it be demanded by any party in interest. (*e*)[1] But it is always possible for partners or their

certain proposed contracts, and, after the completion of one, one partner notifies the other that as to the other contracts he shall proceed on his sole account, the remedy is by suit for a breach of the contract, and not by a bill to account for profits. Doyle *v.* Bailey, 75 Ill. 418. See Cross *v.* Cheshire, 7 Exch. 43. Where there is a distinct promise to pay an ascertained sum, as where a balance of accounts is struck, assumpsit will lie between partners. Hall *v.* Stewart, 12 Pa. 213; Hamilton *v.* Hamilton, 18 Pa. 20. See Morrow *v.* Riley, 15 Ala. 710; Gridley *v.* Dole, 4 N. Y. 486; Miller *v.* Andress, 13 Ga. 366. And where an account stated resulting in such balance is retained by a partner without objection, a promise will be implied, as in other cases. Van Amringe *v.* Ellmaker, 4 Barr, 281. But in matters of difficulty or controversy between partners, it is now most usual to resort to a court of equity for their final adjudication and settlement. Bracken *v.* Kennedy, 4 Ill. 558. It will entertain jurisdiction, although account or other action would lie between the parties. Gillett *v.* Hall, 13 Conn. 426; Cunningham *v.* Littlefield, 1 Edw. Ch. 104. And although one partner cannot bind the firm by deed, Donaldson *v.* Kendall, 2 Ga. Dec. 227; Napier *v.* Catron, 2 Humph. 534; Dickinson *v.* Legare, 1 Desaus. 537; Skinner *v.* Dayton, 19 Johns. 513; Fisher *v.* Tucker, 1 McCord Ch. 170; Williams *v.* Hodgson, 1 H. & J. 474; yet, in some cases, a court of equity will regard a debt secured by the specialty of one partner as a simple contract debt, and hold all the partners bound by it. See Galt *v.* Calland, 7 Leigh, 594; McNaughten *v.* Partridge, 11 Ohio, 123; Christian *v.* Ellis, 1 Gratt. 396; Anderson *v.* Tompkins, 1 Brock. 456; Kyle *v.* Roberts, 6 Leigh, 495; James *v.* Bostwick, Wright, 142. As to pleadings and practice in taking an account, see Auld *v.* Butcher, 2 Kas. 135.

(*e*) Adams Eq. ch. 3, p. 239 *et seq.*; Collyer on Part. (3d Am. ed.) § 298; 1 Story Eq. Jur. § 671; Forman *v.* Hanfray, 2 Ves. & B. 329; Harrison *v.* Armitage, 4 Madd. 143; Russell *v.* Loscombe, 4 Sim. 8; Knowles *v.* Haughton, 11 Ves. 168; Waters *v.* Taylor, 15 Ves. 15; *Ex parte* Broadbent, 1 Mont. & A. 635. See Hayes *v.* Reese, 34 Barb. 151; Vermillion *v.* Bailey, 27 Ill. 230; Pope *v.* Salsman, 35 Mo. 362. A partner may have an account, although he has failed to pay in the capital he agreed to contribute. Palmer *v.* Tyler, 15 Minn. 106. But see Stevenson *v.* Mathers, 67 Ill. 123. An account will not be decreed, if it appears that the party praying for it has no real cause of complaint, and that no good purpose can be served by directing an account to be taken. McKacy *v.* Hebb, 42 Md. 227. Nor when one partner has received, by agreement with his copartners, all he could in any event be entitled to, so that he has no interest in the accounts. Wagner *v.* Wagner, 50 Cal. 76.

[1] A partner may, upon dissolution, maintain a bill for an account. Sharp *v.* Hibbins, 42 N. J. Eq. 543, 9 Atl. 113; Watts *v.* Adler, 130 N. Y. 646, 29 N. E. 131; Love *v.* Rhyne, 86 N. C. 576; Tillar *v.* Cook, 77 Va. 477. The bill lies even if the defendant partner, being the liquidating partner, alleges that he has paid firm debts to a greater amount than the assets. Sharp *v.* Hibbins, 42 N. J. Eq. 543, 9 Atl. 113. All the partners must be parties to the bill. Young *v.* Hoglan, 52 Cal. 466. This right to an account can generally be exercised by a partner only upon dissolution. Nisbet *v.* Nash, 52 Cal. 540. But it is not always necessary to wait for a dissolution. Davis *v.* Davis, 60 Miss. 615; *ante* § 207.

Where the accounts are in such confusion that nothing can be proved, the bill must be dismissed, and the parties left as they were. Clement *v.* Ditterline, (Ky.) 11 S. W. 658; Succession of Gassie, 42 La. Ann. 239, 7 So. 454; Ashley *v.* Williams, 17 Ore. 441, 21 Pac. 556; Slater *v.* Arnett, 81 Va. 432.

representatives to agree together upon some arrangements which render an account unnecessary. Nor is this very unfrequent in fact. The parties interested value the property, good-will, &c., and found their arrangements upon this estimate; one paying to the other a sum of money, without any account being taken. (*f*) But such an arrangement can arise only from an agreement; for if the parties differ as to the value of the property, or of their respective interests therein, an account must be taken, as the only means of determining this. (*g*) Indeed, the taking of an account is a frequent preliminary to any further action by a court of equity; because by this means alone can the court ascertain the true relation of the parties as to their rights and obligations. (*h*) An account and a dissolution seem to be so clearly connected, that Lord Eldon, as we have seen, was unwilling to grant an account, unless the petitioner prayed also for a dissolu-

(*f*) 7 Jarman Convey. 31; Cookson *v.* Cookson, 8 Sim. 529. But see Cook *v.* Collingridge, Jac. 607, 620. Where one partner sells out his interest to another, the presumption is that the price paid is based upon a settlement of accounts. Wiggin *v.* Goodwin, 63 Me. 389; Noonan *v.* Huddleston, 64 Ill. 11.

(*g*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 309, per Sir William Grant: "The next consideration is, whether the terms upon which the defendants proposed to adjust the partnership concern were those to which the plaintiff was bound to accede. The proposition was, that a value should be set upon the partnership stock; and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is clearly, that these are not terms to which he was bound to accede. They had no more right to turn him out than he had to turn them out, upon those terms. Their rights were precisely equal: to have the whole concern wound up by a sale, and a division of the produce. As, therefore, they never proposed to him any terms which he was bound to accept, the consequence is, that, continuing to trade with his stock, and at his risk, they come under a liability for whatever might be produced by that stock. In the case of Crawshay *v.* Collins, 15 Ves. 218, there was no circumstance, except, merely, that there had been no adjustment of accounts with the assignees of the bankrupt. Here, the defendants proposed adjusting the accounts on certain terms, but terms which the other party was not bound to accept. Though he, thinking they had no right to dissolve the partnership, might not have gone into any detail of the principles on which the dissolution should take place, yet I conceive it to have been their duty, in the first place, to put themselves right by offering to him those terms upon which the law gave him a right to insist; and, not having done so, but continuing to trade with his stock under the liability to answer for the profits, the same inquiry should be directed as in Crawshay *v.* Collins, to ascertain what that stock was at the period of the dissolution, what use was afterwards made of it, and what profits were produced by the trade." Wilson *v.* Greenwood, 1 Swanst. 471, 482; Rigden *v.* Pierce, 6 Madd. 353; Cook *v.* Collingridge, Jac. 607.

(*h*) It has often been held that there can be no division of partnership property until all the accounts of the partnership have been taken, and the clear interest of each partner ascertained; that the chancellor may, in a proper case, dissolve the partnership, but cannot aid in carrying it on. Baird *v.* Baird, 1 Dev. & B. 524; McRae *v.* McKenzie, 2 Dev. & B. 232; Camblat *v.* Tupery, 2 La. Ann. 10; Kennedy *v.* Kennedy, 3 Dana, 240. But see Hudson *v.* Barrett, 1 Pars. Sel. Cas. 414.

tion; (*i*) but this cannot be deemed a rule of equity, (*j*) although in the great majority of cases, where the relations between the partners are such that one of them can obtain an account only through the interposition of a court, a dissolution is and should be asked. (*k*)[1]

(*i*) Forman *v.* Hanfray, 2 Ves. & B. 329.

(*j*) In Harrison *v.* Armitage, 4 Madd. 143, it is said that the rule laid down by Lord Eldon applies only to the case of an injunction, or to a case of interim management. The following cases bear on the question; Loscombe *v.* Russell, 4 Sim. 8; Knowles *v.* Haughton, 11 Ves. 168; Waters *v.* Taylor, 15 Ves. 15; Walworth *v.* Holt, 4 Mylne & C. 619, 635. In this last case, Lord Cottenham made a very full review of the authorities; deciding that a relief of this limited kind could be given without a prayer for dissolution, and a final winding up of the affairs of the company. This rule, although not without great conflict, seems now to be decided. Richardson *v.* Hastings, 7 Beav. 301; Fairthorne *v.* Weston, 3 Hare, 387; Miles *v.* Thomas, 9 Sim. 609; Goodman *v.* Whitcomb, 1 Jac. & W. 593; Richards *v.* Davies, 2 Russ. & M. 347; Richardson *v.* Hastings, cited in 3 Hare, 391; Chapple *v.* Cadell, Jac. 537.

(*k*) Loscombe *v.* Russell, 4 Sim. 8; Waters *v.* Taylor, 15 Ves. 10; Forman *v.* Hanfray, 2 Ves. & B. 329; Goodman *v.* Whitcomb, 1 Jac. & W. 589; Chapman *v.* Beach, Jac. & W. 594; Marshall *v.* Colman, 2 Jac. & W. 266; Vansandau *v.* Moore, 1 Russ. 441; Pigott *v.* Bagley, McClel. & Y. 569; Krebell *v.* White, 2 Y. & C. 15. In an action by one partner for a dissolution of the partnership, and an account, &c., alleging that dividends of profits were to be made at stated periods, the court may decree the payment of the sum due for such dividends, before final distribution of the assets. O'Conner *v.* Stark, 2 Cal. 155. The ordinary course is to pray that the partnership may be dissolved, and the surplus assets distributed; but this practice has been relaxed in favor of joint-stock companies, and of other numerous partnerships, and bills have been sustained which asked more limited relief; namely, that the assets of an abandoned or insolvent partnership might be collected and applied in discharge of the debts, leaving the questions of dissolution and contribution as between the partners entirely open for future settlement. Adams Eq. 241· Goodman *v.* Whitcomb, 1 Jac. & W. 572; Marshall *v.* Colman, 2 Jac. & W. 266; Glassington *v.* Thwaites, 1 Sim. & St. 124; Loscombe *v.* Russell, 4 Sim. 8; Walworth *v.* Holt, 4 Mylne & C. 619; Richardson *v.* Hastings, 7 Beav. 301, 323; Apperly *v.* Page, 1 Phillips, 779; Fairthorne *v.* Weston, 3 Hare, 387.

A creditor cannot file a bill to stop a partnership, and wind up its concerns. It is only at the instance of a partner that this can be done. Clement *v.* Foster, 3 Ired. Eq. 213.

[1] We have already seen (*ante*, § 206 *et seq.*) that ancillary relief may be given to a partner during the pendency of a bill for an account. Thus a partner may be enjoined from selling partnership property if the injury would be irreparable. Wilkinson *v.* Tilden, 9 F. R. 683. So a partner may secure protection against a partnership claim wrongfully created by his copartner. Johnson *v.* Buttler, 31 N. J. Eq. 35. In some cases the partnership creditors may intervene, as to secure the benefit of a fund in the hands of a partner resulting from the fraudulent sale of partnership property. Grossini *v.* Perazzo, 66 Cal. 545.

SECTION II.

OF OPENING AN ACCOUNT FOR ERROR.

§ 409. **Account not opened after Lapse of Time.** — Mere errors alone will not always lead to the opening and restating of accounts. If the parties agree, as they sometimes do, that closed accounts shall not be opened for error, after the death of the parties, or after a fixed period, a court of equity will always respect such an agreement, (*l*) unless gross mistake, fraud, or great danger of fraud, be shown. (*m*)[1] And the same reasons which cause part-

(*l*) Gainsborough *v.* Stork, Barnard. 312. See Heath *v.* Corning, 3 Paige, 566; Stoughton *v.* Lynch, 2 Johns. Ch. 218. In Mackellar *v.* Wallace, 8 Moore P. C. 378, the following distinction is drawn: "Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; it may be necessary for that case, and probably it is necessary in most cases, that vouchers should be produced, and that all the information possessed on one side and the other should be furnished in the settlement of that account; and, if it afterwards turn out that there were errors in that account, it is a sufficient ground for opening such account, and setting it right in a court of equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but a sum which one is willing to pay, and the other is content to receive as the result of those accounts, — in a case of that sort, it is obvious that the production of vouchers is entirely unnecessary, and errors in the account are entirely out of the question; for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled. Therefore, it is either an account stated and settled, in the formal sense of the expression, or it is the case of a settlement by compromise."

(*m*) Oldaker *v.* Lavender, 7 Sim. 239. In Mackellar *v.* Wallace, cited *supra*, the court, after laying down the doctrine as above, go on to say: "In either case, the transaction might be vitiated by fraud. In either case, it is good for nothing if, either from the collusion of the parties, or from the circumstances under which the settlement takes place, it is proved in a court of equity that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentation made on the one side or the other, as it ought to have been, and that injustice has been done on either side." Slee *v.* Bloom, 20 Johns. 669, 5 Johns. Ch. 366; Lee's Admr. *v.* Reed, 4 Dana, 112; Botifeur *v.* Weyman, 1 McCord Ch. 156; Barrow *v.* Rhinelander, 1 Johns. Ch. 550; Johnson's Executors *v.* Ketchum, 3 Green Ch. 364; Bloodgood *v.* Zeily, 2 Cai. Cas. 124; Gray *v.* Washington, Cooke, 321; Chappedelaine *v.* Dechenaux, 4 Cranch, 309; Stoughton *v.* Lynch, 2 Johns. Ch. 218, 219, 1 Madd. Ch. Pr. (2d ed.) 103, 262, 280; Herrick *v.* Ames, 8 Bosw. 115; Cann *v.* Cann, 1 P. Wms. 727; Stapilton *v.* Stapilton, 1 Atk. 10; Pullen *v.* Ready, 2 Atk. 592; Lewis *v.* Pead, 1 Ves. Jr. 19; Vernon *v.* Vawdry, 2 Atk. 119, 2 Eq. Cas. Abr. 8; Gordon *v.* Gordon, 3 Swanst. 476; Halhed *v.* Marke, 3 Swanst. 444, note, 1 Hoven-

[1] Where a partnership account has been settled, it will not generally be disturbed. This is especially true where the partners have acquiesced in the account for a number

ners to make such an agreement would induce a court to open an account only for important error, after the death of parties or long acquiescence. (*n*) But it has been held that where a partnership had existed for eight years, and during this time accounts

den on Frauds, 160; Osmond *v.* Fitzroy, 3 P. Wms. 130; Willis *v.* Jernegan, 2 Atk. 251; Milnes *v.* Cowley, 8 Price, 620; Lloyd *v.* Passingham, Cooper, 156; Beaumont *v.* Bramley, 1 Turner, 51; Evans *v.* Bicknell, 6 Ves. 183, 189; Pomeroy *v.* Benton, 57 Mo. 531.

(*n*) A suit to impeach an account ought to be brought within a reasonable time, or at farthest, within the statutory period for commencing an action at law upon matters of account. Lupton *v.* Janney, 13 Pet. 381. And where the bar of the statute is inapplicable, — namely, where the demand is purely equitable, — the court is reluctant to interfere after a considerable lapse of time; particularly after the death of parties whose transactions are involved in the inquiry. Adams Eq. 227; Baker *v.* Biddle, Bald. 418; Ellison *v.* Moffat, 1 Johns. Ch. 46; Ray *v.* Bogart, 2 Johns. Cas. 432; Rayner *v.* Pearsall, 3 Johns. Ch. 578, 586; Mooers *v.* White, 6 Johns. Ch. 360, 370; Bolling *v.* Bolling, 5 Munf. 334; Randolph *v.* Randolph, 2 Call, 537; Dexter *v.* Arnold, 2 Sumn. 108; Wilde *v.* Jenkins, 4 Paige, 481; Dakin *v.* Demming, 6 Paige, 95; Bloodgood *v.* Zeily, 2 Cai. Cas. 124; Gregory *v.* Forrester, 1 McCord Ch. 318, 382; Radcliffe *v.* Wightman, 1 McCord Ch. 408; Hutchins *v.* Hope, 7 Gill, 119; Chesson *v.* Chesson, 8 Ired. Eq. 141. But, where there has been fraud, the court will open and examine accounts after any length of time, even though the person who committed the fraud be dead. Botifeur *v.* Weyman, 1 McCord Ch. 156. But it must be shown that the fraud was not, and could not with reasonable diligence be discovered, until within six years before the commencement of suit. Ogden *v.* Astor, 4 Sandf. 311.

of years. Claflin *v.* Bennett, 51 F. R. 693; Bell *v.* Hudson, 73 Cal. 285, 14 Pac. 791; Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076; Todd *v.* Rafferty, 30 N. J. Eq. 254; King *v.* White, 63 Vt. 158, 21 Atl. 535. After the statute of limitations has run, it would probably be reopened only in case of fraud. Todd *v.* Rafferty, 30 N. J. Eq. 254. But an account may be reopened in equity within a reasonable time for fraud, omission, or mistake; and an injured party may be allowed to "surcharge and falsify." Harrison *v.* Dewey, 46 Mich. 173, 9 N. W. 152; Cobb *v.* Cole, 44 Minn. 278, 46 N. W. 364; s. c. 52 N. W. 985; Silver *v.* St. Louis, I. M. & S. Ry., 72 Mo. 194, 5 Mo. App. 381; Farrington *v.* Harrison, 44 N. J. Eq. 232, 10 Atl. 105; King *v.* Leighton, 100 N. Y. 386, 3 N. E. 594; Powell *v.* Heisler, 16 Ore. 412, 19 Pac. 109; Varner's Appeal, (Pa.) 16 Atl. 98, 2 Monaghan, 228; Henry *v.* Chapman, (Tex.) 16 S. W. 543; Mahnke *v.* Neale, 23 W. Va. 57; Hoyt *v.* McLaughlin, 52 Wis. 280, 8 N. W. 889.

The mistake or fraud which is relied upon must be clearly stated in the bill. Merriwether *v.* Hardeman, 51 Tex. 436. And it must be clearly and certainly proved. Powell *v.* Heisler, 16 Ore. 412, 19 Pac. 109; Varner's Appeal, (Pa.) 16 Atl. 98, 2 Monaghan, 228; Mahnke *v.* Neale, 23 W. Va. 57; Hoyt *v.* McLaughlin, 52 Wis. 280, 8 N. W. 889. Where the facts upon which the application for reopening an account is based were known to the applicant at the time of settlement, equity will refuse to act. Quinlan *v.* Keiser, 66 Mo. 603.

A former partial settlement is no bar to a bill for an account. Thompson *v.* Walker, 40 La. Ann. 676, 4 So. 881; Gleason *v.* Van Aernam, 9 Ore. 343. But if it was a fair settlement, the account will be limited to the unsettled part of the business. Stretch *v.* Talmadge, 65 Cal. 510, 4 Pac. 513; Burke *v.* Fuller, 41 La. Ann. 740, 6 So. 557; Dobbins *v.* Tatem, (N. J.) 25 Atl. 544.

had been taken, without cancellation of books, releases, or discharges in full, an account might be called for. (*nn*)

§ 410. **Accounts opened for Fraud.** — Where there is danger of fraud, or where the accounts were made up by parties having unrestricted power, and acting under strong personal interest, as in the case of accounts between an executor partner and the legatees of the deceased partner, a long acquiescence will not establish them beyond the reach of inquiry; (*o*) and in one case,

(*nn*) Lynch *v.* Bitting, 6 Jones Eq. 238. And see Stephens *v.* Orman, 10 Fla. 9.

(*o*) A., B., & C., in 1796, became partners, as merchants, under articles for seven years, and it was provided, that, if either party died in the mean time, the partnership should be determined, as to his share, from the first of May following his death; and that thereupon an account should be taken, and, after payment of debts, "payment, appropriation, and delivery" should be made, between the surviving partners and the executors of the deceased partner, of the residue of the moneys, goods, &c., of the partnership. In 1801, B. died, and appointed his wife and surviving partners, A. and C., his executors and guardians of his infant children, who were his residuary legatees. A. and C., only, proved the will, and having caused a valuation and account of the partnership assets to be made, a balance sheet was settled up to the first of May, 1801, showing what amount was due to the testator's estate (which included outstanding credits to a large amount), and his estate was credited accordingly in the partnership books, and the partnership continued by the surviving partners, but no severance of the assets was made. In May, 1809, the eldest son came of age, and an account was stated, by the executors, of the testator's residuary personal estate, but which assumed, as its basis, the valuation and account made on the testator's death. Another account was stated of the debts, and credits remaining unpaid and uncollected, showing what was then divisible; and another of the moneys expended for the eldest son's maintenance. A deed, dated September, 1809, between A. and the eldest son, was executed, on which these accounts were indorsed, and A. covenanted for the payment, by instalments, of the share due to the eldest son, so far as the same had been realized; and the eldest son declared he was "content and satisfied with the disclosures thus far made and accounts thus far given," &c.; and it was provided that he should not be prevented from claiming any further share "not as yet received, or fallen in, or accounted for." In 1810, 1815, 1821, 1826, and 1830, changes took place in the partnership firm. There were three younger children, who attained twenty-one, respectively, in 1812, 1813, and 1820, when similar accounts, founded on the same basis, were stated in each of them by the executors; and a similar deed of settlement executed by the two former, and a release by the latter, and further divisions of the testator's assets made accordingly. In 1816, the only other child died an infant, and then also a division of assets was made; and, in 1822, a deed of release was executed by the trustees of the settlement of one of the daughters, in respect of a balance not included in the deed executed by her. The bill was filed in 1831, by the several children and their representatives. It was held that A. and C., being executors and guardians as well as surviving partners, and the release being partial only, and founded on insufficient knowledge by the *cestuis que trustent* of the partnership affairs and accounts, the plaintiffs were not precluded by their deeds or by lapse of time, from inquiring into the mode in which the assets of the old firm had been dealt with, and claiming a share in the profits arising from the testator's assets having been used in the business of the successive partnerships. Wedderburn *v.* Wedderburn, 2 Keen, 722, 4 Mylne & C. 41.

elsewhere referred to, they were opened after some thirty years of acquiescence. (*p*) Where fraud had been committed, an account was opened after nearly as long a time, although the fraudulent partner had long been dead. (*q*) And if the bill praying for the opening of a settled account do not allege fraud, but, in the opinion of the court, the facts stated imply fraud, the prayer will be granted. (*r*)

§ 411. **Accounts opened for Error.** — A party seeking to open an account for error must specify the errors so particularly that each may be judged of by itself. For the court may be unwilling to open an account if, when it is opened, it may be examined and unravelled from end to end. (*s*) But they may be willing to per-

And see Cook *v.* Collingridge, 1 Jac. 607; Walker *v.* Symonds, 3 Swanst. 64, 69; Gregory *v.* Gregory, Cooper, 201, Jac. 631; Champion *v.* Rigby, 1 Russ. & M. 539; Chalmers *v.* Bradley, 1 Jac. & W. 51; Downs *v.* Gazebrooke, 3 Meriv. 200; *Ex parte* Lacey, 6 Ves. 628; Cockerell *v.* Cholmeley, 1 Russ. & M. 425, on the strictness of equity in similar cases of trust. See also Smith *v.* Clay, 3 Bro. C. C. 639, note; Townsend *v.* Townsend, 1 Cox, 28; Bonney *v.* Ridgard, 1 Cox, 145; Beckford *v.* Wade, 17 Ves. 87, 97; Hickes *v.* Cook, 4 Dow, 16, on the question of the length of time that had elapsed. Dickenson *v.* Lord Holland, 2 Beav. 310; Purcell *v.* Cole, 1 Longf. & T. 449; Edwards *v.* Meyrick, 2 Hare, 60, 6 Jur. 924.

(*p*) Wedderburn *v.* Wedderburn, 2 Keen, 722, 4 Mylne & C., 41. And see Hoe *v.* Richards, 2 Beav. 305. Under particular circumstances of fraud, imposition, and delay, a court of equity will decree an account of rents and profits of an estate after an adverse possession of fifty years. Stackpole *v.* Davoren, 1 Bro. P. C. 9. And, in another case, where an entry in an administrator's account, which had been settled, was shown to be fraudulently made, the whole account was opened, notwithstanding the lapse of forty years since the death of the intestate, seventeen since the settlement of the account, and more than two since the discovery of the entry complained of. Special directions were inserted in a decree for the protection of the accounting party. Allfrey *v.* Allfrey, 1 Macn. & G. 87, 1 Hall & Twells, 179, 13 Jur. 269.

(*q*) Vernon *v.* Vawdry, 2 Atk. 119; Botifeur *v.* Weyman, 1 McCord Ch. 161; Lowe *v.* Farlie, 2 Madd. Ch. 102; Beame's Pleas in Eq. 232.

(*r*) Farnham *v.* Brooks, 9 Pick. 212. And see Wormley *v.* Wormley, 8 Wheat. 421; Fullagar *v.* Clark, 18 Ves. 481. Courts of equity feel themselves at liberty to infer, judicially, a fraudulent purpose, from suspicious circumstances, well corroborated and in no way rebutted, though such circumstances fall short of legal proof. Earl of Chesterfield *v.* Janssen, 2 Ves. Sen. 155; Walker *v.* Symonds, 9 Swanst. 71; Taylor *v.* Jones, 2 Atk. 602; Stileman *v.* Ashdown, 2 Atk. 480. A party who has once admitted an account to be correct cannot afterwards file a bill to have the account taken in equity, upon the mere allegation that he had no means of ascertaining that the account so delivered was correct, without charging specific acts of fraud against the defendant; and it is not necessarily an allegation of fraud to say that the accounting party agreed to deliver up certain chattels demanded by the other, upon condition of having his alleged balance admitted and paid. Darthery *v.* Lee, 2 Y. & C. 5; President, &c. of Orphan Board *v.* Van Reenen, 1 Knapp, 100.

(*s*) Union Bank *v.* Knapp, 3 Pick. 113; Kinsman *v.* Barker, 14 Ves. 579; Shepherd *v.* Morris, 4 Beav. 252; Chambers *v.* Goldwin, 9 Ves. 254; Calvit *v.* Markham, 3 How. (Miss.) 343; Mebane *v.* Mebane, 1 Ired. Eq. 403; De Montmorency *v.*

mit the plaintiff to surcharge and falsify. (*t*)[1] If an omission has been made of a credit due, the plaintiff, by showing the same, will be permitted to add it; and this is a surcharge. If a wrong

Devereux, 1 Dru. & W. 119; Leaycraft *v.* Dempsey, 15 Wend. 83; Baker *v.* Biddle, 1 Bald. 394, 418; Bainbridge *v.* Wilcocks, 1 Bald. 536, 540; Consequa *v.* Fanning, 3 Johns. Ch. 587, 17 Johns. 511, 1 Madd. Ch. Pr. (4th Am. ed.) 103; Taylor *v.* Hamlin, 2 Bro. C. C. 310; Wilde *v.* Jenkins, 4 Paige, 481; Weed *v.* Small, 7 Paige, 573; Hobart *v.* Andrews, 21 Pick. 526; Chappedelaine *v.* Dechenaux, 4 Cranch, 306; Bullock *v.* Boyd, 2 Edw. Ch. 293; Philips *v.* Belden, 2 Edw. Ch. 1; Stoughton *v.* Lynch, 2 Johns. Ch. 209; Hickson *v.* Aylward, 3 Moll. 1. Where an account stated is open a long time, as sixteen years after it has been rendered, it will not generally be opened. It will be opened as to fraud or mistakes charged in the bill, and so far proved that the court is satisfied they ought to be corrected; and, when some such errors are proved, then as to other errors charged, which the court is satisfied ought to be made the subjects of further examination. Ogden *v.* Astor, 4 Sandf. 311. And see Clarke *v.* Tipping, 9 Beav. 282; Holland *v.* Holland, 6 Ired. Eq. 407; Pritt *v.* Clay, 6 Beav. 503; Scott *v.* Milne, 5 Beav. 215, affirmed 12 L. J. N. S. Ch. 233, 7 Jur. 709; Jones *v.* Latimer, 1 Jur. 980; Johnson *v.* Curtis, 3 Bro. C. C. 226; Taylor *v.* Hayling, 1 Cox, 435; Dunbar *v.* Lane, 1 Bro. P. C. 3; Maund *v.* Allies, 5 Jur. 860; Milliken *v.* Gardner, 37 Pa. 456. The court will not open a settled account where it has been signed, or a security taken on the foot of it, unless the whole transaction appears fraudulent, upon errors specified in the bill, and supported by evidence. Drew *v.* Power, 1 Sch. & L. 182. See Parker *v.* Jonté, 15 La. Ann. 290, as to alleged errors in books.

(*t*) Consequa *v.* Fanning, 3 Johns. Ch. 587; Troup *v.* Haight, Hopk. 239; Chappedelaine *v.* Dechenaux, 4 Cranch, 306; Redman *v.* Green, 3 Ired. Eq. 54; Bullock *v.* Boyd, 1 Hoff. Ch. 294; Nourse *v.* Prime, 7 Johns. Ch. 69; Philips *v.* Belden, 2 Edw. Ch. 1; Grover *v.* Hall, 3 H. & J. 43; Freeland *v.* Cocke, 2 Munf. 352; Compton *v.* Greer, 2 Dev. Ch. 93; Miller *v.* Wornack, Freem. Ch. 486; Lilly *v.* Kroesen, 3 Md. Ch. 83; Williams *v.* Savage Manuf. Co., 1 Md. Ch. 306; Kinsman *v.* Barker, 14 Ves. 579; Vernon *v.* Vawdry, 2 Atk. 119, Barn. Ch. 280, 305; Sewel *v.* Bridge, 1 Ves. Sen. 297; Earl Pomfret *v.* Lord Windsor, 2 Ves. Sen. 482; Pitt *v.* Cholmondeley, 2 Ves. Sen. 565; Brownel *v.* Brownel, 2 Bro. Ch. 62; Chambers *v.* Goldwin, 9 Ves. 254; Anon., 2 Eq. Abr. 12. Plaintiff, in his bill, having assigned 150 errors in five stated accounts, an order was made on him to pick out those he would insist on, and, if the court should be of opinion they were not errors, to consent to waive the rest. If the court thought them errors, there would be good cause either to decree an open account, or give plaintiff leave to surcharge and falsify. Rodney *v.* Hare, Mos. 296. See further, on the question of surcharging and falsifying, Roberts *v.* Kuffin, 2 Atk. 112; Chambers *v.* Goldwin, 5 Ves. 837; *Ex parte* Townshend, 2 Moll. 242; Hickson *v.* Aylward, 3 Moll. 14; Davies *v.* Spurling, 1 Tamlyn, 199, 1 Russ. & M. 64; Millar *v.* Craig, 6 Beav. 433. The party complaining of errors in a settled account should make the errors appear by proof. Bry *v.* Cook, 15 La. Ann. 493.

[1] "Surcharge" means to add an omitted item in the account; "falsify," to correct a wrong item. "Upon a liberty to the plaintiff to surcharge and falsify, the *onus probandi* is always on the party having that liberty; for the court takes it as a stated account, and establishes it. But if any of the parties can show an omission, for which credit ought to be, that is a *surcharge;* or if anything is inserted that is a wrong charge, he is at liberty to show it, and that is a *falsification.* But that must be by proof on his side. And that makes a great difference between the general cases of an open account, and where only to surcharge and falsify; for such must be made out." Lord Hardwicke, L. C., in Pitt *v.* Cholmondeley, 2 Ves. Sen. 565, 566.

charge is stated in the account, the plaintiff may be permitted to remove it; and this is falsification. (*u*) It may be added, as a general remark, that whenever accounts are stated by persons having great trust reposed in them, and great power, a court of equity allows a latitude in opening and examining such accounts, bearing some proportion to that trust and power. (*v*)

§ 412. **Plaintiff must pay in a Debt due from Him.** — In England, the practice is quite uniform of requiring a partner who petitions for an account, and either admits expressly or by implication that he is, or is shown to be, owing to the partnership a private debt or balance, to pay that debt or balance into court before a decree will issue. (*w*) This is not true of a debt on partnership account; for if a partner avers that he has taken money from the firm, but avers also that a balance is still due to him, he is not required to pay into court the money thus taken, unless special reasons exist for the requirement. (*x*) The rule

(*u*) In reference to these terms, see 1 Story Eq. Jur. § 525; Pitt *v.* Cholmondeley, 2 Ves. Sen. 565, 566; Perkins *v.* Hart, 11 Wheat. 237, 256.

(*v*) Matthews *v.* Wallyn, 4 Ves. 118; Newman *v.* Payne, 2 Ves. Jr. 199; Pitt *v.* Cholmondeley, 2 Ves. Sen. 565; Stoughton *v.* Lynch, 2 Johns. Ch. 217; Higginson *v.* Fabre, 3 Desaus. 93. Thus, in ordinary cases, the rule is, that the establishment of a material mistake is necessary to induce the court to give a decree entitling the party to surcharge and falsify an account. But, where the relation of attorney and client subsists, the ordinary rule does not prevail; for there, though the party only alleges generally that the accounts, as settled, are erroneous, the court will, if sufficient cause be shown, make a decree opening those accounts. Lawless *v.* Mansfield, 1 Dru. & W. 557.

(*w*) Vin. Abr. Partners (E), 5; Melioruchi *v.* Royal Ex. Ass. Co., 1 Eq. Abr. 8; Gold *v.* Canham, 2 Swanst. 325, 1 Ch. Ca. 311. See Mulhollan *v.* Eaton, 11 La. 291. Payment of money into court is directed where the defendant admits money to be in his hands which he does not claim as his own, and in which he admits that the applicant is interested. Adams Eq. 350. See, on this subject, Hosack *v.* Rogers, 9 Paige, 468; Clagett *v.* Hall, 9 G. & J. 81; Contee *v.* Dawson, 2 Bland, 293; Nokes *v.* Leppings, 2 Phillips, 19; Maddox *v.* Dent, 4 Md. Ch. 543.

(*x*) Foster *v.* Donald, 1 Jac. & W. 252. In this case, the plaintiffs and the defendant carried on business together in the north of England. It had been proposed to dissolve the partnership; and the terms of dissolution had been nearly arranged, when the defendant represented that, before finally acceding to them, he thought it proper to go to London, for the purpose of consulting a friend residing there. In the course of his journey, he went round to several customers of the firm, in different parts of the country, and collected of them debts due to the partnership to the amount of about 2,318*l.* In one instance, a debt due by himself had been set off against a debt due to the firm, and he received the difference. The bill was filed for an account of the partnership transactions. The defendant, in his answer disclosing these facts, stated that he believed the balance of the account would be in his favor. Lord Eldon: "If a partner, as partner, receives money belonging to the firm, and, admitting that he has received it, insists that there is a balance in his favor, there is no pretence for making him pay it in. But if he has received it under circumstances from which you can infer that he had agreed not to receive it, and that his receiving it was contrary

is, therefore, applicable only to a private and personal debt. It would hardly be applied here, merely on the authority of the English practice; but it rests in that country on the general principle, that he who asks equity must be ready to do equity; and it may be expected that a similar rule will be provided for here, by the rules of practice of the courts of equity. (*y*)

SECTION III.

HOW AN ACCOUNT SHOULD BE TAKEN.

§ 413. **Accounting by the Parties.** — As to the manner of taking an account, the first remark to be made is, that the parties themselves may regulate this, and the court will respect their agreement. (*z*) This may be contained in the original articles, or in subsequent agreements. Or it may be derived from their practice. Where partners have, for a considerable time, settled their accounts in a certain way and upon certain terms, it is obviously reasonable to infer that this was their agreement and understanding. Equity will draw this inference, and direct the

to good faith, then he may be ordered to bring it into court. Cases may happen where 10,000*l*. may be due to him, and yet he may have received 1,000*l*. under such circumstances that he will not be allowed to retain it. . . . Though it is very true that a partner may receive partnership effects, and insist on not paying in the amount, unless all the other partners will pay in what they have in their hands, yet I think the defendant has admitted himself to have received these sums in a manner in which he ought not to have received them. He must, therefore, pay them in." See Richardson *v.* The Bank of England, 4 Mylne & C. 165, in which the question is fully considered. See also Mills *v.* Hanson, 8 Ves. 68, 91; Domville *v.* Solly, 2 Russ. 372; Toulmin *v.* Copland, 3 Y. & C. 643. In Jervis *v.* White, 6 Ves. 738, the defendant was ordered to pay money into court before answer in a case of gross fraud, appearing upon affidavit by the plaintiff, and by a corresponding affidavit by the defendant. Daniel's Ch. Pr. (Perkins' ed.) 2024; Vann *v.* Barnett, 2 Bro. C. C. 158; Costeker *v.* Horrox, 3 Y. & C. 530.

(*y*) Under section 244 of the New York Code of Procedure, as amended in July, 1851, a partner, who by his answer admits that he has in his hands partnership funds, which on his statement appear to belong to the administrators of his deceased partner, will be ordered to pay over such funds to them, although there are outstanding contested claims against the firm, and it has claims to enforce which will require time and disbursements. The order for such payment will, however, require the administrators to give security to the surviving partner to contribute to the outstanding claims, if established, and to pay their share of the expenses that may be incurred in prosecuting the demands of the firm. The surviving partner will also be permitted to retain sufficient to cover such claims against the deceased partner as are contested in the suit in which the order is made. Roberts *v.* Law, 4 Sandf. 642. If a defendant by his answer acknowledges any particular sum due, though he swears those sums were discharged, yet it is still a ground for directing an account. Brace *v.* Taylor, 2 Atk. 253.

(*z*) See *ante*, § 208.

account to be taken in a similar manner. (*a*) Indeed, this evidence from custom, or from conduct and acquiescence, is even stronger than that of expressed agreement. For if there be certain terms agreed upon, and the accounts have been kept in disregard of them for a considerable time, and without objection, we have seen that the court will treat it as a waiver of the terms by the party whom they benefit, or as a subsequent agreement cancelling them. (*b*) And the accounts need not be signed by the parties, if there be other evidence of acquiescence. The possession of the account and vouchers for a long time, without objection, will be deemed evidence of acquiescence; not only from its intrinsic probability, but because the other parties have a right to know and meet, at an early period, any objections which exist, or else to go on upon the assumption that none exist. (*c*) Hence in a leading American case, it was held that a

(*a*) Jackson *v.* Sedgwick, 1 Swanst. 460, 469, per Lord Eldon: "Partnership accounts may be taken in various ways. The distinction is, that, in the absence of a special agreement, the accounts must be taken in the usual way; but where a special agreement has been made, it must be abided by, provided that the parties have acted on it; if not, I always understood that the articles are read in this court as not containing the clauses on which the parties have not acted."

(*b*) Geddes *v.* Wallace, 2 Bligh, 270; Petty *v.* Janeson, 6 Madd. 146; Const *v.* Harris, Turn. & Russ. 496, 523; Jackson *v.* Sedgwick, 1 Swanst. 460, 469.

(*c*) Willis *v.* Jernegan, 2 Atk. 251. The plaintiff's counsel objected to the defendant's plea of a stated account, on the ground that it was not signed by the parties. Lord Hardwicke: "There is no absolute necessity that it should be signed by the parties who have mutual dealings, to make it a stated account; for even where there are transactions supposed between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection which shall bind him, and prevent his entering into an open account afterwards." Id. 252. Tickel *v.* Short, 2 Ves. Sen. 239; Morris *v.* Harrison, Colles P. C. 157; 1 Story, Eq. Jur. § 526; 2 Dan. Ch. Pr. 762; Jessup *v.* Cook, 1 Halst. (5 N. J. L.) 436; Lamalere *v.* Caze, 1 Wash. C. C. 436, 2 P. A. Browne, 128; Murray *v.* Toland, 3 Johns. Ch. 569; Wilde *v.* Jenkins, 4 Paige, 481; Freeland *v.* Heron, 7 Cranch, 147; Codman *v.* Rodgers, 10 Pick. 112. But in Clancarty *v.* Latouche, 1 Ball & B. 428, it was held, by Lord Chancellor Manners, that acquiescence alone, in accounts furnished, does not amount to a settlement, although it must have considerable effect. This, however, was in reference to an account which was usurious; and which, even if expressly concurred in, would have been set aside. Where an account relied on as a stated account has not been signed, it is not enough to prove the delivery of it. The acquiescence of the other party in it must also be proved. Irving *v.* Young, 1 L. J. Ch. 108. In the Attorney-General *v.* Brooksbank, 2 Y. & J. 42, the chief baron of the exchequer expressed an opinion that an account stated must be actually signed by the parties, to enable the defendant to plead it in bar to a suit for an account; although he seemed to suppose an account not signed might be a good defence, if set up in the answer and proved at the hearing. Commenting on this, Chancellor Walworth says: "That opinion is clearly not law; and it is directly opposed to that of Lord Hardwicke, in Willis *v.* Jernegan, 2 Atk. 252, where he says, in express

partner would be deemed to acquiesce in any statement of account to which he did not object within a reasonable time.(*d*)

But the terms of an account, whether proved expressly or by implication, are not conclusive. Even if the articles, or subsequent agreements, or practice with acquiescence, or all together, would lead to the conclusion that certain terms had been agreed upon, still, if fraud, oppression, or uncompensated and extreme injury, can be shown, the court will direct the account to be stated upon premises more consistent with justice. (*e*) It may be said, in general, that whenever on a dissolution questions arise among the partners as to the division of the property or profits, these questions fall within the jurisdiction and practice of equity. (*ee*)

§ 414. **Accounting before a Master.** — If a decree for an account issues, and the case is referred to a master to take an account, his method of proceeding will be governed very much by the rules and custom of his own court. In general, the parties must produce before him all books, vouchers, and evidence, bearing upon the general account or any special items;[1] and he may examine

terms, that it is not necessary that the account should be signed by the parties." Heartt *v.* Corning, 3 Paige, 566.

(*d*) Heartt *v.* Corning, 3 Paige, 566. And see 1 Story, Eq. Jur. § 526; Com. Dig. Ch. 2 A. 3; Lamalere *v.* Caze, 1 Wash. C. C. 436; Killam *v.* Preston, 4 W. & S. 14. In Lamalere *v.* Caze, the court says: "To constitute a settled account, all the parties must consent to it; all must be bound by it, or none are. This consent must be either expressed or implied. I am inclined to think, that if, after dissolution, one partner were to state the account, and send it to the other, who should by his conduct show his acquiescence, by retaining it for a considerable time, without objections, that he might be bound by that statement, as well as the other, and that this action for the balance might then be maintained." But in Killam *v.* Preston, Kennedy, J., delivering the opinion of the court, and deciding that a partnership account stated by one partner after the dissolution, and presented to the other, who retains it in his possession for more than a year without objecting to it, is not sufficient evidence, upon which a recovery of the balance appearing to be due upon it may be had, said: "It would seem, from the weight of authority, that there must not only be a final settlement and balance struck, but an express promise to pay, otherwise the action cannot be maintained. Foster *v.* Allanson, 2 T. R. 479; Fromont *v.* Coupland, 2 Bing. 170. The only authority to the contrary that I am aware of is a *nisi prius* decision of Gibbs, C. J., in Rackstraw *v.* Imber, Holt, N. P. Cas. 368, where he says he considers an implied undertaking sufficient." And see Irving *v.* Young, 1 Sim. & St. 333. And see further, on this question, Attwater *v.* Fowler, 1 Edw. 417; Story Eq. Pl. § 801; Cooper Eq. Pl. 278, 279; Moravia *v.* Levy, 2 T. R. 483, note; Casey *v.* Brush, 2 Caines, 296; Ozeas *v.* Johnson, 1 Binn. 191, and cases in previous note.

(*e*) Oldaker *v.* Lavender, 7 Sim. 239; Story on Part. § 206; Collyer on Part. (Perkins' ed.) b. 2, ch. 2, § 225.

(*ee*) See, for cases in which the English court of chancery took jurisdiction of such questions, Wood *v.* Scoles, L. R. 1 Ch. 369; Ibbotsam *v.* Elam, L. R. 1 Eq. 188; Homfray *v.* Fothergill, L. R. 1 Eq. 567.

[1] Partnership books are of course receivable in evidence in taking an account, though either partner has a right to show their incorrectness. Carpenter *v.* Camp, 39 La. Ann. 1024, 3 So. 269; Topliff *v.* Jackson, 12 Gray, 565; Boire . McGinn, 8 Ore. 466.

not only witnesses, but all the parties, and should examine any party at the suggestion or desire of any opposite party, unless this be obviously and certainly unreasonable. (*f*)

Generally, the master should begin from the last account which was closed and settled, taking the balance thereof as his basis; unless, by order of court, or for reasons shown, he goes behind this account. If there be no settled account, he must supply the

(*f*) Ferry *v.* Henry, 4 Pick. 75; Glyn *v.* Caulfield, 15 Jur. 807; Toulmin *v.* Copland, 3 Y. & C. 655; Beckford *v.* Wildman, 16 Ves. 438. In one case, where a surviving partner, who had possession of the partnership books, wilfully and fraudulently refused to produce them, to have the accounts taken under a decree for that purpose, the master, in the absence of other evidence, charged ten per cent per annum on the capital stock, as the net gains made during the partnership, and debited the surviving partner with a moiety thereof. The court held that the master was justified in so doing, and made a decree accordingly. Walmsley *v.* Walmsley, 3 J. & La T. 556. And in another case, where the defendant denied charges in the bill of fraud and misconduct, and explained others away, alleging his inability to put in a full answer, by reason that plaintiff withheld improperly the partnership books, the court refused (but without prejudice to future application) the injunction prayed by the bill. Littlewood *v.* Caldwell, 11 Price, 97. In 1811, A. & B. entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820, a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in A.'s hands. All the outstanding debts were subsequently settled. In 1830, B. was declared bankrupt, till which time the books were never called for by B. It was held, that A. & B., nevertheless, continued tenants in common in respect of them, and that the length of time did not affect that relationship; and, therefore, although there was no charge of fraud in the settled account, yet the commissioner had jurisdiction to call A. before him, and examine him and the books relative to the former dealings of the bankrupt. *Ex parte* Trueman, 1 Deac. & Ch. 464; *Ex parte* Levett, 1 Glyn & J. 185. So, the solicitor of the purchaser of an estate from a bankrupt has been ordered to attend (but without prejudice to privilege) for the purpose of being examined. *Ex parte* Hodgson, 2 Glyn & J. 21. But where a partnership has expired by efflux of time, and, in a suit for account, &c., a receiver has been appointed before decree, the court will not compel defendant (the former managing partner) to deliver up to receiver, for the purpose of making out bills of costs, partnership books and accounts which have remained in his hands, and title-deeds belonging to a third person, which came into the possession of the copartners as solicitors; such defendant offering the receiver free access thereto, and to assist in making out such bills. Dacie *v.* John, McClel. 206, 13 Price, 446. Partnership accounts having been directed to be taken by the masters in a case in which some of the books have been lost, the court directed the master, if it should appear in taking the account that any necessary books, &c., should be wanting, to report the same specially, and whether in consequence of the want of such books he was unable to proceed satisfactorily in taking the account. Millar *v.* Craig, 6 Beav. 433. See further, in reference to accounts in partnership books, Heartt *v.* Corning, 3 Paige, 566; Caldwell *v.* Leiber, 7 Paige, 483; Simms *v.* Kirtley, 1 T. B. Monroe, 80; Stoughton *v.* Lynch, 2 Johns. Ch. 217, 218; Allen *v.* Coit, 6 Hill, 318; Withers *v.* Withers, 8 Peters, 359; United States Bank *v.* Binney, 5 Mason, 188; Phillips *v.* Turner, 2 Dev. & B. Eq. 123; Fletcher *v.* Pollard, 2 Hen. & Munf. 544; Brickhouse *v.* Hunter, 4 Hen. & Munf. 363; Kyle *v.* Kyle, 1 Gratt 526; Hallett *v.* Hallett, 2 Paige, 432.

want of one, by beginning with the partnership, and stating the account according to ordinary rules and usage, unless they are controlled by some agreement of the parties, or some peculiar circumstances, which he will be careful to report. (*g*) And he must continue the account to the day on which he makes it, unless there has been a previous dissolution.[1] In that case, he will continue it to the dissolution, and either stop there, or from that day begin a new account; for the dissolution has terminated the partnership, and the account thereafter is not an account between partners. (*h*) And if there be outstanding items to be

(*g*) Beak *v.* Beak, Cas. temp. Finch, 190. In this very early case on the question, a bill was brought to have an account of the estate of Elias Beak, deceased, and of a stock of money by him brought into trade with the defendant, Arnold Beak, his brother, in the year 1648. The bill set forth that in April, 1662, a balance was made; that from the year 1648 a joint trade was carried on between the brothers, till February, 1673; that several balances were made in loose papers, and "a particular balance in February, 1673," when all the particulars were agreed between them, excepting only an error of a small amount. It appears, however, from the further report of the case, that Elias made his will in March, 1667, and soon after died. It was admitted on all sides, that an account ought to be had of the estate in partnership; but the question was about the time it should begin, and how long it should continue. The counsel for the plaintiffs insisted on an account stated in the year 1662, and that it ought to proceed from that time without any retrospect; and that the stock of Elias might not be carried on in a pretended partnership after his death, but that it might be accounted as his separate estate from that time. The counsel for the defendant argued that the account of the joint trade ought to be carried on till all the accounts relating to the partnership could be settled and made even. The court decreed an account, and that if the master should find a balance concerning the joint trade, either in 1662, or in 1673, or at any other time, then he was to take it from such time; otherwise, it must take its rise from the year 1648, when the partnership first began, and must be carried on to the death of Elias, but not afterwards. For the plaintiff ought not to be concluded by any new or growing account in trade, but only is to have an account of what was then in partnership, and the proceeds thereof till got in.

(*h*) Booth *v.* Parks, 1 Molloy, 465, per Sir A. Hart, Lord Chancellor: "There can be no partnership without existing partners. It is not correct to say, that the survivor, carrying on the business for the purpose of winding it up, carries on a partnership-trade: he only deals with the effects finally *ex necessitate,* and rather in the character of a trustee. If he continues it as a trade, it is at his own risk, liable to the option of accounting for profits, or being charged with interest upon the deceased partner's share of the surplus, as taken at his death." In Dyer *v.* Clark, 5 Met. 575, Shaw, C. J., says: "The time of the dissolution fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and, therefore, much time may elapse before the affairs can be wound up,

[1] Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16. Where an account was taken on a bill filed by the mortgagee of a partner, and it appeared there had been a dissolution, the account was ordered to be taken at the date of dissolution; otherwise, the court said, it should have been taken at the date of the bill. Whetham *v.* Davey, 30 Ch. D. 574.

settled afterwards, when they are settled they must be referred back to that period. (*i*) The same principles of appropriation of payment which have already been spoken of will be applied to the account; the most general one being that the earliest payment shall be applied to the earliest debt, and the first sum paid in by a customer who deposits and draws is the first sum drawn out. (*j*)

§ 415. **Terms of Account** — In regard to the terms of the account and settlement, and the charges, credits, or allowances to be made, it has been conceded, by the highest authority, that specific rules are of little use, because the justice of every case requires that its peculiar facts and merits, the nature of the trade, the conduct of the parties, and all the various circumstances which affect the rights of the parties, must be taken into consideration in determining what they are or should be.[1] In our note

the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the funds."

(*i*) Stoughton *v.* Lynch, 2 Johns. Ch. 209; Dyer *v.* Clark, 5 Met. 575. And see Tyng *v.* Thayer, 8 Allen, 391; Brinley *v.* Kupfer, 6 Pick. 179; Williams *v.* Henshaw, 11 Pick. 79, 12 Pick. 378; Dickinson *v.* Granger, 18 Pick. 315, 317.

(*j*) Clayton's Case, in Devaynes *v.* Noble, 1 Meriv. 572; Bodenham *v.* Purchas, 2 B. & Ald. 39; Pemberton *v.* Oakes, 4 Russ. 154; Toulmin *v.* Copland, 3 Y. & C. 625. In this last case, it was decided that where persons carry on business in the nature of a banking business, — as, for instance, that of navy agents, — and a change takes place in the house by the death or retirement of a partner, on taking the partnership accounts, the rule in Clayton's Case will be held *primâ facie* to apply as well between the partners themselves as between the partners and third persons; and there must be strong evidence to rebut the presumption as to that mode of taking the partnership accounts. Therefore, where A. and B. were partners as navy agents, and A. becoming a lunatic, that partnership was dissolved, and the business was carried on upon the same terms by B. and C., and B. died, and the accounts of both partnerships were unsettled, it was held that the accounts of A. and B. must be taken on the foundation of the rule in Clayton's Case, although C., in order to establish an agreement to the contrary, set up certain affidavits made by B., in a suit brought against him by the committee of the lunatic, in which he alluded to an understanding between B. & C. (which, in some instances, had been acted upon), that the advances made to the customers of their firm should be repaid before any portion of the moneys paid in by those customers was applied in liquidation of their debts due to the original firm.

[1] Reasonable expenses of closing up the business are proper items in the account, and are chargeable against the firm, in favor of a surviving or liquidating partner. Burke *v.* Fuller, 41 La. Ann. 740, 6 So. 557; Tompkins *v.* Tompkins, 18 S. C. 1. Such expenses are the cost of taking care of the partnership property and keeping the books, Holloway *v.* Turner, 61 Md. 217; or fulfilling contracts which bound the firm. Tompkins *v.* Tompkins, 18 S. C. 1. And of reasonably litigating suits brought on claims against the partnership. Brownell *v.* Steere, 128 Ill. 209, 21 N. E. 3; Lee *v.* Dolan, 39 N. J. Eq. 193; Leiserman *v.* Bernheimer, 113 N. Y. 39, 20 N. E. 869.

will be found many cases in which special circumstances were considered by English and American courts. (*k*) One rule, already

(*k*) Willett *v.* Blanford, 1 Hare, 253, 269, per Sir James Wigram, V. C.: "I have again considered the subject, and read the cases to which I was referred; and I remain of the opinion I expressed at the close of the argument, that there is no rule of this court applicable alike to all cases; and that there is no rule which is so established or general in its application, that it is to be taken to be the general rule, until circumstances are shown which displace it. The facts of each case must be fully brought under the view of the court, before it can be in a position to state what justice to the party seeking its protection may require, with due regard to the interest of other parties. No one can attend to the elaborate judgments of Lord Eldon in Crawshay *v.* Collins, Brown *v.* De Tastet, and even in Cook *v.* Collingridge, without being satisfied that his mind saw the impossibility of subjecting cases so various as those of trading partnerships to any universal rule. The decrees in these cases, that of Sir William Grant in Featherstonhaugh *v.* Fenwick, and the judgment and decree of Lord Cottenham in Wedderburn *v.* Wedderburn, confirming Lord Landgdale's decree in the same case, all concur to establish the soundness of Lord Eldon's opinions; and I think it is impossible to consider the subject, abstractedly from authority, without feeling satisfied that justice would be endangered by an attempt to subject all cases of this description to any uniform rule." Where one firm enters into copartnership with a third person as a distinct firm, they are all in the new firm as individuals, and the profits must be divided equally amongst all. Warren *v.* Smith, 9 Jur. N. S. 168. If no valuation of the services of the respective partners is agreed upon, none can be made in settling the account, however much they may differ in value. Kaiser *v.* Wilhelm, 2 Mo. App. 596. A., the partner of B., having charge of the firm business at a certain place, employs a firm, of which he is also a member, to conduct it on commission. Accounts are rendered to B., who makes no objection. A. also sells goods of one firm to the other firm, with notice to B., and at full market value. B. cannot, after dissolution and settlement, demand an account of A.'s share of the commission; nor is A. to account for profits received by him as partner in the purchasing firm, although said firm takes the goods to fill contracts for delivery at a larger price than they pay for it. Fuch *v.* Blakiston, (Pa.), 15 Alb. L. J. 288. An attorney at law, who is a partner in a commercial firm, cannot charge against his firm commissions for collecting accounts due it. Vanduzer *v.* McMillan, 37 Ga. 299. In making up accounts between partners, presumptions are against those who by fraud or negligence embarrass the settlement; and it will be the duty of the master, in such case, to protect the firm. Harvey *v.* Varney, 104 Mass. 436. Where partners are to share equally, and on dissolution, after a losing business, one is found to have contributed more than the other to the capital, the loss must be shared equally, notwithstanding the inequality of contribution. Nowell *v.* Nowell, L. R. 7 Eq. 538. Articles between C., W., B., & S. provided that C. and W. should contribute the whole capital in unequal proportions; that C. should contribute "such terms as he may be able to give;" that W., B., & S. should each contribute all their time to the business; that each partner should receive one-fourth of the net profits; and that C. and W. should receive interest on the capital contributed by them. The business resulted

The expense of taking the account and the costs of the bill for account should also be paid out of the assets. *In re* Beck's Estate, 19 Ore. 503, 24 Pac. 1038; Moore's Appeal, (Pa.) 19 Atl. 753. But an expense due entirely to the fault of the settling or managing partner, as where he committed a tort in the course of the business and was obliged to pay compensation for it, cannot be included in the account. Thomas *v.* Atherton, 10 Ch. D. 185 (C. A.).

stated, is of so much practical importance, that we repeat it here; it is, that a partner settling the business, as a surviving or remaining partner, is looked upon as a trustee, and the rules of equity devised to secure the faithful discharge of a trust are all of them applicable to him. (*l*)[1] In a case in Louisiana, it is said

in loss, and the firm was dissolved. It was held, that the capital constituted a debt of the firm, to which all the partners were obliged to contribute equally; and that, one of them being insolvent, the loss was to be borne equally by the other three. Whitcomb *v.* Converse, 119 Mass. 38. A., the owner of an established business, agrees with B. that the latter shall receive a certain percentage of the profits, annually, up to $5,000. In accounting, A. cannot charge profit and loss, with interest on capital, or on old business debts, or with B.'s salary. But he may charge depreciation of plant; and, if the business is sold at an advance above the estimated value at the time of the agreement, B. has no right to a percentage on the difference. Rishton *v.* Grissell, L. R. 5 Eq. 326. Where A. and B. enter into a copartnership for the purpose of a commission and warehouse business, A. to furnish the buildings and fixtures, and B. to keep the books and to give his time and talents to the business, B. may, on his own account, procure other houses for storage, if A. refuses, and the firm business is not neglected. And, if in such case the managing partner dies, his estate will be entitled to share in the profits upon storage earned in his lifetime, but not collected till after his death, deducting the actual expenses accruing after the decease. And, if the proceeds of sales are not called for for twelve years, the estate of the deceased partner will be entitled to a decree for his proportion thereof. Parnell *v.* Robinson, 53 Ga. 26. When, after a dissolution, the continuing partner carries on the business with the partnership stock pending settlement, he will not be required to account for profits made subsequent to dissolution, if at that time the retiring partner had no interest in, but was in debt to, the firm. Taylor *v.* Hutchinson, 25 Gratt. 536. On a bill against surviving partners for an account, they should be charged with the value of the assets as likely to be realized on reasonable diligence in the disposition thereof, and not with their value as of the date of the decease. Moore *v.* Huntington, 17 Wall. 417. The surviving partner may be allowed for expenditure not strictly on partnership account, if made in accordance with the previous practice of the firm, and the business has been continued at request of the deceased partner. Tillotson *v.* Tillotson, 34 Conn. 355.

(*l*) Cook *v.* Collingridge, Jac. 607, 622, 2 Fonb. Eq. 186; Simpson *v.* Feltz, 1 McCord Ch. 213, 220; Honore *v.* Colmesnil, 7 Dana, 201; Beacham *v.* Eckford's Exec., 2 Sandf. Ch. 116; West *v.* Skip, 2 Ves. Sen. 242. Where, after dissolution by death, cotton held on commission was sold by the surviving partner, and the proceeds were not claimed within twelve years, it was held that the estate of the deceased partner was entitled to its proportion of such unclaimed proceeds. Parnell *v.* Robinson, 53 Ga. 2. See also Keyes's Appeal, 65 Pa. 196.

[1] Where a bill for an account is brought by a partner who has been wrongfully excluded from the business, he is ordinarily granted a decree for his share of the profits; and if two or more partners combine to exclude him, he may have a decree charging them jointly. Bloomfield *v.* Buchanan, 14 Ore. 181, 12 Pac. 238. Where the share of one partner in the business is purchased by a copartner by fraud, he would usually have the option to claim either profits, as if he had been wrongfully excluded, or his damages with interest. In a case where in spite of the fraud he had received the full value of his share, he was held not to be entitled to a share of the profits, since neither his exertions nor his capital had helped in any degree to earn them. White *v.* Reed, 124 N. Y. 468, 26 N. E. 1037.

that the correct rule in taking an account between partners is to ascertain what each has contributed, and first to make them equal, and then devide the balance of the proceeds. (*ll*)

§ 416. **Method of stating Accounts.** — [The method of stating partnership accounts is not to state an account between the partners directly. Each partner is primarily the debtor or creditor of the firm, not of his co-partners. The account of each partner with the firm is therefore first to be stated. This process determines the amount which each partner is to pay or to receive. Upon the basis of the individual accounts the court may decree a payment from one partner to another; not because the former is indebted to the latter, but because the former is indebted to the firm, and the firm to the latter.[1] This account is of course to be taken after all the debts of the firm have been paid, since the item of profit or loss cannot be adjusted until that time. After the payment of all liabilities there can be no distribution between the partners till an account is taken.[2] Yet it is not necessary to wait till all transactions are completed before filing a bill for an account; on the contrary, such a bill is usually brought to secure the settlement of the partnership affairs.[3]

Upon a final accounting, the advances of both partners stand upon the same footing as contributions of capital; that is, both enter into the account between the partner and the firm. If there has been a loss, so that capital and advances cannot be repaid in full, the loss is divided; the partner to whom least is owed by the firm paying over to the partner who is more in advance his proper share of the loss. Thus if one partner has put in all the capital, which has been lost, and the profits are equally divided between the two partners, his co-partner must pay over to him half the amount of the loss.[4]].

(*ll*) Frigerio *v.* Crottes, 20 La. Ann. 351.

[1] Garrett *v.* Robinson, 80 Ala. 192. See Lindl. Part. 396, *et seq.*

[2] Gale *v.* Sulloway, 62 N. H. 57.

[3] Walsh *v.* McKeen, 75 Cal. 519, 17 Pac. 673.

[4] See *ante*, § 173; Binney *v.* Mutrie, 12 App. Cas. 160; Nowell *v.* Nowell, L. R. 7 Eq. 538; Sangston *v.* Hack, 52 Md. 173; Whitcomb *v.* Converse, 119 Mass. 38. But in Killefer *v.* McLain, 70 Mich. 508, 38 N. W. 455, it was held that after the debts were paid the individual creditors of one partner could secure payment of all debts which were contracted before the beginning of the partnership out of the capital contributed by their debtor before the copartner could come on it for his advances to the firm.

One partner has no lien on the share of the other for a private debt due from the latter. Therefore after the partnership accounts have been stated and a balance found due to a partner, he may claim his statutory exemption out of it before his copartner can seize it for a private debt. Evans *v.* Bryan, 95 N. C. 174.

§ 417. **Interest.** — [When the accounts of the partnership have been settled and a balance found due to one partner, or against the other, interest is often claimed upon the balance; and the courts are not agreed in the view they take of the matter. If a partner is indebted to the partnership, it is ordinarily because he has overdrawn his account; if the partnership is indebted to a partner, it is usually because of advances made by the partner. But the balance in favor of a partner may consist entirely of accrued profits; the balance against a partner may result from a breach of his agreement to advance a certain amount as capital. Whether or not interest will be allowed should depend upon the cause of the balance. Interest upon a sum of money is given either because of an express or implied contract to pay it, or as damages for failure to pay over a certain amount of money at a definite time.[1] It is evident that the partner's share of undivided profits was never payable, and therefore that no interest should be given by way of damages for not paying it. Agreed capital not paid in, however, should bear interest, since an obligation to pay a certain amount of money at a certain time has been broken. As to advances and overdrafts of a partner the case is more difficult; yet it seems impossible to distinguish such items from the item of undivided profits. The partner in advancing or withdrawing money is not doing an isolated act, as to which the obligations are at once to be settled. He is simply adding one item to a long account between himself and the firm. Until the account comes to be settled, he is not called upon to repay what he withdraws, nor can he complain if he is not reimbursed the exact amount of his advances. A simple running account does not bear interest, in the absence of an agreement that it shall do so.[2] The better view, then, would seem to be that interest shall be allowed upon a partnership account, in the absence of agreement, only when a partner has failed to pay in the agreed amount of capital. The great weight of authority is to this effect. Thus, it is held that no interest will be allowed upon the balance of a partnership account.[3] The case of advances by a

[1] 1 Sedg. Dam. (8th ed.) §§ 282, 301.

[2] 1 Sedg. Dam. (8th ed.) § 310.

[3] See *ante*, § 156; Dexter *v.* Arnold, 3 Mass. 284; Gage *v.* Parmalee, 87 Ill. 329; Kemmerer *v.* Kemmerer, (Ia.) 52 N. W. 194; Wendling *v.* Jennisch, (Ia.) 52 N. W. 341; Sweeney *v.* Neeley, 53 Mich. 421, 19 N. W. 127; Brown's Appeal. 89 Pa. 139; McKay *v.* Overton, 65 Tex. 82; Gilman *v.* Vaughan, 44 Wis. 646; Carroll *v.* Little, 73 Wis. 52, 40 N. W. 582. *Contra*, Masonic Savings Bank *v.* Bangs, (Ky.) 10 S. W. 633.

It has been said in some cases that the allowance of interest on partnership accounts cannot be determined on any rule of law, but depends solely upon the facts. Buckingham *v.* Ludlum, 29 N. J. Eq. 345; Johnson *v.* Hartshorne, 52 N. Y. 173; Gyger's

partner would seem not to differ from any other circumstance of the account; and it is usually held that in the absence of agreement a partner is not entitled to interest on advances.[1] Where a partner fails to pay in the capital which he has agreed to pay, he is liable for interest on the balance.[2] And when there is an agreement, either express or implied, to pay interest, it will of course be allowed.[3] But the payment will cease upon dissolution, unless a contrary intention is evident, since the firm then ceases to earn profits.[4]

A surviving or settling partner may, however, be bound to pay interest upon a balance left in his hands. Either unreasonable delay in paying over a balance, or misconduct in the use of the assets will render such a partner liable for interest. Thus where he fails to pay over a balance at the proper time he is liable for interest.[5] So where he mingles the funds with his own, or otherwise uses them for his own purposes;[6] but if there is no improper delay or misuse such a partner is not liable for interest.[7] Where a surviving partner is obliged to pay out money in advance of getting in the assets, he has been held entitled to interest.[8]

Compound interest will not usually be allowed, without agreement;[9] but in case of bad faith, as where there has been persistent and wrongful failure to account, it may be allowed.[10]]

Appeal, 62 Pa. 73. This means no more than that the facts may show an agreement to pay interest, or some such fraud or misconduct as will give a claim for interest in a particular case.

[1] Prentice *v.* Elliott, 72 Ga. 154; Lee *v.* Lashbrooke, 8 Dana, 214; Clark *v.* Worden, 10 Neb. 87; Morris *v.* Allen, 14 N. J. Eq. (1 McCarter) 44 (*semble*); Jones *v.* Jones, 1 Ired. Eq. 332; Holden *v.* Peace, 4 Ired. Eq. 223. But see *contra*, Reynolds *v.* Mardis, 17 Ala. 32; Ligare *v.* Peacock, 109 Ill. 94; Baker *v.* Mayo, 129 Mass. 517; Berry *v.* Folkes, 60 Miss. 576; Hodges *v.* Parker, 17 Vt. 242.

[2] Krapp *v.* Aderholt, 42 Kas. 247, 21 Pac. 1063.

[3] Montague *v.* Hayes, 10 Gray, 609; Payne *v.* Freer, 91 N. Y. 43; McKay *v.* Overton, 65 Tex. 82. It was pointed out in Payne *v.* Freer, 91 N. Y. 43, that though called interest, the payment by a partner of a percentage on overdrafts was not properly so called, for he could not be said to borrow the money. It was a mere method of adjusting the profits, and was not to be repaid to any one unless upon final accounting a balance was due to the copartner. For this reason it was decided that though the amount to be paid exceeded the legal rate of interest, the agreement for the payment (or rather for the charge in the accounts) of this percentage was not usurious. *Acc.* Campbell *v.* Coquard, 16 Mo. App. 552; Cunningham *v.* Green, 23 Oh. St. 296.

[4] Watney *v.* Wells, L. R. 2 Ch. 250; Bradley *v.* Brigham, 137 Mass. 545; Johnson *v.* Hartshorne, 52 N. Y. 173.

[5] Beale *v.* Beale, (Ill.) 2 N. E. 65: Crabtree *v.* Randall, 133 Mass. 552.

[6] Dunlap *v.* Watson, 124 Mass. 305; Coddington *v.* Idell, 30 N. J. Eq. 540.

[7] Brownell *v.* Steere, 128 Ill. 209, 21 N. E. 3.

[8] Collender *v.* Phelan, 79 N. Y. 366.

[9] McCall *v.* Moss, 112 Ill. 493; Sangston *v.* Hack, 52 Md. 173, 201.

[10] Heath *v.* Waters, 40 Mich. 457, Pomeroy *v.* Benton, 77 Mo. 64; Johnson *v.* Hartshorne, 52 N. Y. 173.

§ 418. **Return of Premium.** — [A premium, or as it is sometimes called in this country a bonus, is the consideration paid by an incoming partner for admission into the business. It goes, of course, to the prior owner of the business (whether sole trader or partnership) and not into the assets of the new firm.

Where a premium has been paid for admission into a firm, and the firm has afterwards been dissolved, the English courts frequently award a return of part of the premium. The ground for such a decision is rather obscure. The premium was paid for an interest in the business; and just what was paid for has been obtained. That interest each partner continues to have notwithstanding the dissolution. The remedy of the partner would seem not to be an action or bill for a return of part of the premium, but a claim for including in the account the value of the good-will. The business, of which he bought a share, was made up of two elements; the corporeal chattels, and the good-will. Since his share of the former must be secured to him upon dissolution, all that remains for complete justice is to secure him a share of the latter, and to this he is entitled.[1] If the partner secures his share of the chattels and good-will, and also a return of part of the premium, he is keeping what he bought and recovering what he paid for it.[2]

The theory upon which the English doctrine rests is probably that the purchaser bought not only an interest in the business, but the valuable services of the seller as his partner. The objection to this theory is, that the purchaser could not have a right to the services of his copartner unless he secured that right by a contract. If he entered into a partnership without contracting for the services of the other for a certain time (as, for instance, into a partnership at will), he has no ground for complaint if the other withdrew his services, as he had a right to do. If, on the other hand, the selling partner obliged himself by contract to remain in the firm, and dissolved the partnership wrongfully, an action of contract would be the proper action. If the seller concealed any fact which rendered him incapable of doing what he agreed to do (as that he was on the verge of bankruptcy, or that he had a mortal disease) he procured the partnership fraudu-

[1] This view seems to have been held by Sir Thomas Plumer, M. R. In Akhurst *v.* Jackson, 1 Swanst. 85, he refused to order the return of any part of the premium, upon dissolution by the bankruptcy of the partner who had received it, on the ground that the paying partner had obtained for the premium what he paid it for: the right of becoming a partner.

[2] *Ante*, § 181.

lently, and might be sued in tort. It has however become established in England in the last fifty years that, upon a premature dissolution of a business, the court will ordinarily order a return of an equitable part of the premium;[1] the court of equity having full discretion both as to awarding any return[2] and as to the amount.[3] It would clearly be unjust for the new partner to get both a share of the good-will and a return of part of the premium; and though it has never been expressly decided, it seems clear that a return of premium can be had only when no disposition can be made of the good-will. In fact, most cases involving the return of premiums are cases of the taking into a professional business, as that of a solicitor or a surgeon, a junior partner, and in such cases not only could no disposition be made of the good-will upon dissolution, but the business would naturally go to the senior partner.[4]

It is very doubtful whether a return of premium would ever be ordered in this country. The few cases in which the point was raised have, with a single exception, refused to order a return.[5] In a case in Kentucky the English doctrine was stated without disapproval; but a return was not ordered.[6]

It is well settled, both in England and in this country, that where one is induced by fraud to buy an interest in a business he may get back what he paid for it.[7] This, however, is clearly a different case from the one under discussion.]

§ 419. **English Doctrine.** — [The English doctrine as to return of premium seems to be, that where the dissolution is by decree, there must be a return of premium unless the dissolution was solely caused by the fault of the purchasing partner. Thus, if dissolution was decreed because of mutual incompatibility, with-

1 Wilson *v.* Johnstone, L. R. 16 Eq. 606.

2 Lyon *v.* Tweddell, 17 Ch. D. 529 (C. A.)

3 It is to be such proportion of the premium as is just and equitable, not necessarily in proportion to the elapsed time. Bullock *v.* Crockett, 3 Giff. 507.

4 An instructive case in that connection is Bond *v.* Milbourn, 20 W. R. 197. In that case the articles provided for a valuation of the good-will upon dissolution; and the Court refused to order a return of premium. See Rooke *v.* Nisbet, 50 L. J. N. S. Ch. 588.

5 Durham *v.* Hartlett, 32 Ga. 22; Carlton *v.* Cummins, 51 Ind. 478; Swift *v.* Ward, 80 Ia. 700, 45 N. W. 1044.

6 Boughner *v.* Black, 83 Ky. 521. The defendant had bought a share in a certain business, giving in payment his promissory note. In an action on the note he was allowed to recoup damages to the business resulting from the misconduct of plaintiff, the selling partner.

7 Jauncey *v.* Knowles, 29 L. J. N. S. Ch. 95; Mycock *v.* Beatson, 13 Ch. D. 384; Richards *v.* Todd, 127 Mass. 167.

out fault of either, a return will be ordered.[1] So where the dissolution was because of the fault or misconduct of the partner who received the premium.[2] So where the dissolution was because of the bankruptcy of the latter.[3] And when a physician received a premium for accepting a partner and promised to introduce the latter to his patients, but, before he could do it, died of a mortal disease from which at the time of sale he knew he was suffering, a return of part of the premium was decreed.[4] On the other hand, where the partner who paid the premium refused to go on with the partnership, he was held not entitled to a return of premium;[5] and it has been said that where the partners dissolved partnership by a written agreement there could be no return of premium unless it was provided for in the agreement.[6]

It has even been held that where a partnership may be dissolved at the will of either partner, the partner who received a premium must return part of it if he soon dissolves it.[7] The general rule was well stated by Lord Cairns, L. C., in Atwood *v.* Maude:[8] —

"If the partner who has received the premium should afterwards commit a breach of the partnership articles, and himself dissolve the partnership, or render its continuance impossible, the court will not allow him to take advantage of his own wrongful act, but decrees the restitution of a proportion of the premium paid, having regard to the terms of the contract and to the length of time during which the partnership has continued. But, on the other hand, if the partner who has paid the premium is guilty of a like breach of the partnership articles, and is himself the author of the dissolution, the court will not allow him to found a claim to the restitution of the premium upon his own wrongful act."]

§ 420. **Sale of Assets.** — A sale is sometimes decreed as a preliminary proceeding, or a means for making an account; and,

1 Airey *v.* Borham, 29 Beav. 620; Pease *v.* Hewitt, 31 Beav. 22; Brewer *v.* Yorke, 46 L. T. N. S. 289 (C. A.). But see Wilson *v.* Johnstone, L. R. 16 Eq. 606.

2 Hamil *v.* Stokes, 4 Price, 161; Bury *v.* Allen, 1 Coll. 589; Astle *v.* Wright, 23 Beav. 77; Atwood *v.* Maude, L. R. 3 Ch. 369 (criticised in Wilson *v.* Johnstone, L. R. 16 Eq. 606).

3 Freeland *v.* Stansfeld, 2 Sm. & Giff. 479 (but see *contra*, Akhurst *v.* Jackson, 1 Swanst. 85).

4 Mackenna *v.* Parkes, 36 L. J. N. S. Ch. 366.

5 Bluck *v.* Capstick, 12 Ch. D. 863.

6 Lee *v.* Page, 30 L. J. N. S. Ch. 857, 7 Jur. N. S. 768.

7 Featherstonhaugh *v.* Turner, 25 Beav. 382; Rooke *v.* Nisbet, 50 L. J. N. S. Ch. 588. *Contra*, Carlton *v.* Cummins, 51 Ind. 478; Swift *v.* Ward, 80 Ia. 700, 45 N. W. 1044.

8 L. R. 3 Ch. 369, 372

in some instances, a sale will be ordered on mere motion. (*m*) We have already adverted to the fact, that a sale is, generally speaking, that method of disposing of the property, or facilitating its division, which is least open to the danger of fraud or mistake, and is, therefore, much favored. Perhaps the rule may be stated thus: The presumption is always in favor of a sale; the parties may agree to substitute something else, and the court will sanction such an agreement, unless it is open to obvious and decided objection, as tainted with fraud or oppression, or leading to injustice. (*n*) But no party has a right to insist on taking the property at a valuation, without the consent of the other; nor may he insist as a matter of course upon the division of the property *in specie*, although this would be more favored than the taking at a valuation without consent. (*o*) Still, it must always be possible, that the peculiar circumstances of the case may make a sale injurious, and that the true interests of all parties may be better preserved and protected without it; and then a court is under no obligation to require a sale. (*p*)

(*m*) Crawshay *v.* Maule, 1 Swanst. 523.

(*n*) *Ex parte* Montgomery, 1 Glyn & J. 341; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Fox *v.* Hanbury, Cowp. 445; Crawshay *v.* Collins, 15 Ves. 218; Regden *v.* Pierce, 6 Madd. 353; Fereday *v.* Wightwick, 1 Tamlyn, 261; 3 Kent Comm. 64; 2 Bell Comm. 632, 633; Evans *v.* Evans, 9 Paige, 178; Cook *v.* Collingridge, Jac. 607; Leach *v.* Leach, 18 Pick. 75.

(*o*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Cook *v.* Collingridge, Jac. 607; Regden *v.* Pierce, 6 Madd. 353; Sigourney *v.* Munn, 7 Conn. 11; Evans *v.* Evans, 9 Paige, 178; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Conwell *v.* Sandidge, 8 Dana, 278; Crawshay *v.* Maule, 1 Swanst. 495, 523; Simmons *v.* Leonard, 3 Hare, 581.

(*p*) See cases cited *ante*, in the two preceding notes. A partner's interest in a trade-mark or brand is too unsubstantial to justify a court in ordering a sale. Taylor *v.* Bemis, 4 Biss. 406.

CHAPTER XVII.

OF LIMITED PARTNERSHIPS.

§ 421. **Origin of Limited Partnerships.** — Formerly the name of limited partnership was given to one formed for a special or particular business or enterprise. (*a*) The meaning of this phrase was not well defined, and it was of no importance in the law. Now, however, in this country, it is applied to a new thing. A limited partnership, in the present sense of the phrase, is one in which one or more of the partners are so in the usual way, in respect to power, property, and obligation; and one or more of them have placed a certain sum in the business, and may lose that, but are not liable further.

The purpose of the law in permitting such a partnership is obvious. It is to encourage and facilitate trade and commerce, and induce capitalists to embark their capital therein, or a certain part of their capital, by relieving them from the peril, hanging over all partnership by the common-law merchant, of losing not only all they have in the trade, but all they have beside. On the continent of Europe, it has long been known, (*b*) and found to be useful and safe. And almost forty years ago it was permitted in the great commercial State of New York, by a statute copied substantially from the French Code of Commerce; this being, says Chancellor Kent, the first instance in the history of the legislation of that State, in which the statute law of any other country than Great Britain has been closely imitated and adopted. (*c*) Not

(*a*) Willett *v.* Chambers, Cowp. 814, 816; 2 Bell Comm., b. 7, ch. 2, p. 261, 5th ed. See also Robey *v.* Howard, 2 Stark. N. P. C. 557. For illustrative cases, see Carrick *v.* Vickery, Doug. 652, n.; Holmes *v.* Higgins, 1 B. & C. 74; Livingston *v.* Roosevelt, 4 Johns. 251; Dubois *v.* Roosevelt, 4 Johns. 262; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Ensign *v.* Wands, 1 Johns. Cas. 171; Schollenberger *v.* Seldonridge, 49 Pa. 83.

(*b*) Coope *v.* Eyre, 1 H. Bl. 48, per Lord Loughborough: "In many parts of Europe, limited partnerships are admitted, provided they be entered on a register; but the law of England is otherwise, the rule being, that, if a partner shares in advantages, he also shares in all disadvantages." Limited partnerships (*la Société en commandité*) were established in France by the ordinance of 1673, and have been continued and regulated by the new code of commerce. *Répertoire de Jurisprudence par Merlin*, tit. *Société*, art. 2; *Code de Commerce*, b. 1, tit. 3, § 1.

(*c*) 3 Kent's Comm. 36, 7th ed.

long afterwards, the example was followed by other States; and now there are similar provisions in upwards of twenty States. (*d*) In England, this law is not yet adopted, excepting as to joint-stock companies. (*e*)[1]

Limited partnership is an innovation upon mercantile law which has stood the severe test of American practice for a whole generation, and has never been recalled or importantly modified, (*f*) nor found dangerous or injurious to the public, nor seriously objected to in any point of its working; and it may therefore be regarded as resting upon good authority. (*g*)[2]

(*d*) Maine, Massachusetts, Rhode Island, Connecticut, Vermont, New York, New Jersey, Pennsylvania, Maryland, Indiana, Michigan, South Carolina, Georgia, Mississippi, Alabama, Florida, Louisiana, Illinois, Virginia, Kentucky, Delaware, Tennessee, Ohio, and California, and probably in other States, of which the information has not yet reached us. Banking and insurance are excepted in New York, New Jersey, Pennsylvania, Maryland, South Carolina, Alabama, Georgia, Florida, Maine, Massachusetts, Mississippi, Connecticut, Vermont, Rhode Island, Delaware, Tennessee, Ohio, and California.

(*e*) The principle has been applied in England to joint-stock companies; and a great number of statutes have been passed in relation thereto. The most important are the following; viz., 1 Vict. ch. 73; 7 & 8 Vict. ch. 110; 18 & 19 Vict. ch. 133; 19 & 20 Vict. ch. 47; 25 & 26 Vict. ch. 89. By 21 & 22 Vict. ch. 91, joint-stock banking companies are allowed to be formed on the principle of limited liability. In the British province of New Brunswick (ch. 121, Rev. Stat. of N. B.), the principle has been adopted for general business, with the usual exceptions of banking and insurance. And also in Nova Scotia, with like exceptions. Rev. Stat. ch. 79, §§ 12–25.

(*f*) Troubat (Limited Partnership, § 39) says: "That the statutes on limited partnership in the various States should be, in substance, identical, is perfectly natural; inasmuch as the common source, the commercial code of France, the work of the jurists of the empire, has been largely borrowed from by them all."

(*g*) "Every one," says an able French writer, "may have an interest in commerce and trade, under such a system, for amounts small or large. The facility, too, of realization has thrown round this form of investment considerable attraction. We have seen large capitals thus drawn, in the promptest and easiest way, into the general industrial and commercial movement; and the adjunction of bailors of funds to responsible general partners constitutes not a union of persons, but an association of capitals analogous to that of incorporated companies. In this manner has it come to pass that limited partnerships have become in reality so many incorporations, wherein the liability of the general partners stands in lieu of the authorization of government. . . . To convey an idea of the immense service rendered by limited partnerships, with capitals divided into shares thus transferable, it will suffice to say that calculations, untinged with exaggeration, carry to above a thousand millions the capital engaged in this form of social business. A few years, too, have sufficed to bring about this truly colossal result, in spite of the cases of gross swindling and signal frauds that have marked the progress of the new combination of interests. But by these

[1] An approach to a limited partnership was made by Bovill's Act, 28 & 29 Vict. ch. 86; *ante*, § 45.

[2] It is said that the tendency now is to regard limited partnerships with increasing favor, and to construe the statutes more liberally than at first. White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276.

§ 422. **General Principles of the System.** — No one doubts that the general liabilities of partners, however severely they may press upon individuals in some cases, are, on the whole, wise and necessary. And if the limited partnership, which is free from these stringent liabilities, is useful and safe, both for those who engage in it and for the community, it must be from the excellence of that system of precaution by which the community is protected. The general principles of this system are, first, ascertaining the actual placing of the sum proposed within the joint funds, where it may be liable for the joint debts; secondly, giving adequate public notice of the amount, and of the parties, and of the business, so that the public may estimate correctly the credit to be given to the firm, and providing, also, that notice should be given of any important change; thirdly, securing this joint fund from undue diminution, and thus preventing the original notice from being deceptive and injurious. The statutes of no two States are verbally alike; but they all imitate the statute of New York in these essentials, which that statute borrowed from the Code of Commerce of France. (*h*) They differ more or less in the exact

frauds it was not creditors who suffered; it was the shareholders themselves." Wolowsky, *Des Sociétés par Actions*, 7, 9, 13. In reference to the same matter, Watson on Part. 2, citing Pothier on Obligations, says: "Society *in commendam*, &c., was that between two persons, one of whom only put his money into stock, without doing any other office of a copartner; the other, who was called the *complementary* of the society, dispatching all the business in his own name. This society was very useful to the State; inasmuch as all kinds of persons, even nobles and professional men, might contract it, and thus make their money of service to the public; and those who had no fortune of their own to trade withal, hereby found means of establishing themselves in the world, and of making their industry and address serviceable."

(*h*) In Ames *v.* Downing, 1 Bradf. 321, 329, the court, in holding that a special partnership, formed under the provisions of the Revised Statutes of New York, is dissolved by the death of the special partner, and that it is, like a general partnership, a personal contract, expiring with the death of any of the parties, make an elaborate examination of the origin, history, and nature of limited partnerships. We quote at some length. "The system of limited partnerships," say the court, "which was introduced by statute into this State, and subsequently very generally adopted in many other States of the Union, was borrowed from the French code. 3 Kent Comm. 36; *Code de Commerce*, 19, 23, 24. Under the name of *la Société en commandité* it has existed in France from the time of the Middle Ages; mention being made of it in the most ancient commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar Latinity of the Middle Ages, it was styled *commenda* and in Italy *accommenda.* In the statutes of Pisa and Florence, it is recognized as far back as the year 1160; also, in the ordinance of Louis-le-Hutin, of 1315; the statutes of Marseilles, 1253; of Geneva, of 1588. In the Middle Ages, it was one of the most frequent combinations of trade, and was the basis of the active and widely-extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean; was known in Languedoc, Provence, and

provisions by which these essential precautions are taken; but they resemble each other so much in these that they may be stated generally as follows.

Lombardy; entered into most of the industrial occupations and pursuits of the age; and even travelled, under the protection of the arms of the Crusaders, to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaping the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading classes, and brought the commons into position as an influential estate in the commonwealth. Independent of the interest naturally attaching to the history of a mercantile contract of such ancient origin, but so recently introduced, where the general partnership, known to the common law, has hitherto existed alone, I have been led to refer to the facts just stated, for the purpose of showing that the special partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood, and regulated. Ducange defines it to be, 'SOCIETAS MERCATORUM *qua uni sociorum tota negotiationis cura commendatur, certis conditionibus.*' It was always considered a proper partnership (*societas*), with certain reserves and restrictions; and in the ordinance of Louis XIV., of 1673, it is ranked as a regular partnership. In the Code of Commerce, it is classed in the same manner. I may add, as an important fact, for the explanation of a distinction to which I shall shortly advert, that the French code permits a special partnership, of which the capital may be divided into shares or stock, transmissible from hand to hand. In such a case, the death of the special partner does not dissolve the firm, the creation of transmissible shares being a proof that the association is formed *respectu negotii*, and not *respectu personarum;* but, even in such a partnership, the death of the general partner effects a dissolution, unless it is expressly stipulated otherwise. But says M. Troplong, it would be wrong to extend the rule that a partnership, of which the capital is divided into transmissible shares, is not dissolved by the death of a shareholder, to a special partnership, the capital of which is not so divided. The statute of New York recognizes only the latter kind of partnership; the names of the parties being required to be registered, and any change in the name working a dissolution, and turning the firm into a general partnership. Such a partnership has always been held to be dissolved by the death of the special partner. This partnership remains under the dominion of the common law. It has created between the special and the general partner a tie which is not subjected to the caprice of unforeseen changes; it has produced mutual relations of confidence, which the general partner cannot be forced to extend to strangers. M. Troplong, Comm.; *du Contrat de Société Civile, &c.*, T. 1 *préface*, 57, § 377, &c., T. 2, § 888, p. 368. The French jurists generally take the same position; defining the special partnership as a proper partnership, and applying the law of dissolution by death to all. *Pothier, Traité du Contrat de Société*, ch. 2, § 2, ch. 8, § 3; *Merlin, Répertoire de Jurisprudence*, art, *Société*, § 7; *Duranton, Droit Français*, tom. 17, l. 3, tit. 9, § 470. Pardessus discusses the question somewhat at length. *Droit Commercial*, tom. 4, pt. 5, tit. 3, ch. 1, § 4. It might be thought, he says, with some appearance of plausibility, that the rule of a dissolution by death should be limited to general partnerships, in forming which the probity and intelligence of each member have been reciprocally taken into consideration. Indeed, the special partner does not suppose, on the part of the general partners, any personal confidence in the special partners; and, as the interests and the rights of the latter are exclusively limited to their

§ 423. **General Partners.** — There must be some persons who are general partners, all of whose names are used in the firm, without the addition of "company," or any other phrase indicating that there are other general partners.[1]

All of these general partners are liable to creditors in precisely the same way as if there were no special partners.

The general partners alone conduct and control the business of

shares, it would seem that they were not modified by their decease, and their heirs called to take their place could have no right to insist that death has dissolved the firm, nor the general partners insist upon that result. These reasons, to question the general rule, appear, nevertheless, to yield to others more decisive. The persons, and the character of the special partners have been regarded by the general partners when they formed this kind of association. The special partners are, in effect, to a greater or less extent, called to the annual accountings, to meetings for the settlement of the profits and losses, and to an examination of the state of the affairs. This scrutiny, and a right to insist upon a dissolution in consequence of a breach of the contract, or to urge their claims when the affairs are liquidated, are more or less rigorously exercised. The difficulty of acting harmoniously with different persons, substituted in the place of those with whom the original contract was made, the distrust of heirs, who have not the grounds of esteem and confidence which influenced the deceased, and the impossibility of treating easily with minors, — are some of the reasons which will not permit special partnerships to be excepted from the general rule. It may be objected that these reasons apply only in favor of the general partners, and that it is for them to judge as to the continuation of the business with the heirs. But the heirs of the deceased ought to enjoy the same privilege. Reciprocal rights ought to result from a mutual agreement. There is no solid reason why the special partnership should not be dissolved by the death of one of the partners, except when the capital is divided into transmissible shares; in which case, the associates having consented that each may substitute another in his place, as he may desire, without the authority of the others, it is natural to conclude that the heirs of a deceased member fill his place in the same manner as if he had assigned his share. I have given the substance of the reasoning of Pardessus; and the result he attains has not only the authority of M. Troplong in its favor, but also that of other commentators (*MM. Malpeyre et Jourdain*, No. 474; *M. Persil, Fils*, p. 344), while it does not appear to have been questioned or doubted. (But as to this, see Troubat on Limited Part. (Phila.) 1853, § 430, citing Fierli, vol. 1, 46, 47; *Casaregis de Commer.*, Disc. 29, No. 10; *Zanch de Société*, No. 19, 20). It thus appears that, in the jurisprudence of that nation whence the peculiar contract of a special partnership has been adopted by us, and grafted into our law, — where the system has long existed, is familiarly known, and its nature, qualities, and practical relations to various events and circumstances have been well considered under the light of no brief experience, — the effect of the death of the special partner is to dissolve the firm. This agrees with the conclusion I had attained upon independent reasoning, before consulting those authorities; and I am, consequently, led to pronounce the firm in which the testator was a special partner, dissolved at his death; and to hold the executor, who was his general partner, responsible for the testator's interest in the firm at that time, upon a liquidation of the affairs, as if made then." pp. 329–333. For a similar *résumé*, see Jacquin *v.* Buisson, 11 How. (N. Y.) Prac. 385, *et seq.*, in which the above opinion is concurred in.

[1] A minor may be a general partner. Continental Nat. Bank *v.* Strauss, (N. Y.) 32 N. E. 1066.

the partnership. But, in some States, the statute permits the special partner to examine at his pleasure into the accounts and business of the firm, and give advice in relation to it; and, where this is not expressly permitted, it would doubtless be allowed from its inherent propriety and necessity.[1]

§ 424. **Certificate.** — There must be a certificate, signed by all the parties, setting forth sundry particulars, verified by the oath or affirmation of the parties before a magistrate; and, before the business commences, this certificate must be properly advertised, and also recorded with some public records, (*a*) in the place where the parties reside, or where the firm is to do business, or in both, and in every other place where the firm is to do business.

The particulars which this certificate must state are generally these: —

The names of all the partners, distinguishing between those who are to be general partners and those who are to be only special partners; and the residences of all.

The name which the firm is to bear. The amount of money actually paid in, in cash, by the special partners.[2]

(*a*) The articles do not take effect till they are recorded. As to transactions before that time, the partners are general partners. Levy *v.* Lock, 5 Daly, 46; [Smith *v.* Warden, 86 Mo. 382].

[1] There is nothing in the statutes to prevent a special partner from agreeing with the others to share part of the losses. Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320.

[2] Where the capital appears to have been paid in cash, this must have been done or the certificate is invalid. But if the cash was paid in *bonâ fide* by the special partner, and was at once paid out by the general partners for purposes of the firm, before the certificate was filed, the certificate was good. Vernon *v.* Brunson, (N. J.) 25 Atl. 511. If the special partner contributes cash in good faith, and the general partners afterwards buy from him the assets of the business to which it is intended that the limited partnership shall succeed, though all his cash contribution is repaid to him the transaction is valid, provided it was *bon fide;* but if it was a mere device to cover a contribution of goods instead of cash, the transaction is not valid. Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320. See Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693. In some States, the contribution of the special partner must be in cash. In that case nothing but cash is enough. A contribution of goods is invalid. *In re* Allen, 41 Minn. 430, 43 N. W. 382. So of credits, or the assets of another firm, or even of government bonds. Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693. In Pennsylvania the contribution may be made in goods at a valuation. An excessive valuation does not render the certificate invalid, if it was *bonâ fide.* Rehfuss *v.* Moore, 134 Pa. 462, 19 Atl. 756. Full information must be given as to the nature of the goods; and the value itemized. Maloney *v.* Bruce, 94 Pa. 249. Therefore a certificate that a certain amount was contributed "in merchandise, lumber, and bills receivable," is invalid. It cannot even be told how much each item was worth. Van Horn *v.* Corcoran, 127 Pa. 255, 18 Atl. 16. See further, as to the particularity required in filing a statement of the capital contributed,

The nature of the business in which the firm proposes to engage, or for which it is formed.

The time for which the partnership is formed; that is, the day on which it is to begin and the day on which it is to end, or the period for which it is to endure.

All of these are preliminary measures of notice and precaution. And the special partner must look to it that all are complied with; for a substantial mistake, or an intended omission or error, by himself or by a general partner, or by any other special partner, destroys the limitation of the partnership, and all the partners stand at once on the common liabilities of partners.(*i*) This is

(*i*) Richardson *v.* Hogg, 38 Pa. 153; Vandike *v.* Rosskane, 67 Pa. 330; Bowen *v.* Argall, 24 Wend. 496; Madison County Bank *v.* Gould, 5 Hill, 309; Smith *v.* Argall, 6 Hill, 479; 3 Denio, 435. A contribution "in cash and goods" is not a contribution "in cash," Van Ingen *v.* Whitman, 62 N. Y. 513; *Re* Merrill, 13 N. B. R. 91; nor is a permission to use certain United States bonds, the bailee not having notice of this permission. Haggerty *v.* Foster, 103 Mass. 17. One who has not strictly complied with the requisitions of the statutes respecting limited partnerships cannot claim exemption, as a special partner, from liability for the debts of the firm of which he is a member. Thus, the provision in the Pub. Stats., ch. 75, § 2, of Massachusetts, requiring an actual cash payment, as capital, to be made by one who enters a firm as a special partner, in order to exonerate him from liability for the debts of the firm, is not complied with by the

Laflin & Rand Powder Co. *v.* Steytler, 146 Pa. 434, 23 Atl. 215; Cock *v.* Bailey, 146 Pa. 328, 23 Atl. 370.

It was formerly held that a cash contribution cannot be made by giving a check payable to the order of the partnership, though the special partner had funds in the bank to meet it. McGinnis *v.* Farrelly, 27 F. R. 33. But a check that is certified by the bank has been held good as a contribution of cash. Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693; White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276. Yet the certification is only the acceptance of the bank, instead of the special partner, as debtor; so that it seems hard to draw a line between the cases. It would perhaps be better to make the question turn on the facts; if the drawer of the check was in good credit at a sound bank, his check might well be regarded as cash. The only alternative would seem to be to require an actual payment of cash by the special to the general partner. In Rothchild *v.* Hoge, 43 F. R. 97, it was held that where the special partner, being in good credit, contributed a check on a neighboring bank, payable immediately, and the bank, as soon as the check was presented, placed the amount to the credit of the firm, there was a good contribution of cash. It did not appear that the check was presented before the certificate was filed. Under the Pennsylvania Acts, the whole capital need not be contributed at once, provided it is so stated in the certificate; but some part at least must be paid in before the certificate is filed. Hill *v.* Stetler, 127 Pa. 145, 17 Atl. 887. Where it was certified that three-fourths of the capital was paid in, and it appeared that some had paid more and some less than that portion of their contributions, but three-fourths of the whole amount had been paid in, the certificate was valid. Lauder *v.* Logan, 123 Pa. 34, 16 Atl. 44. The certificate speaks from the time of filing; it is therefore enough that the capital is paid in then. White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276. If the certificate is false, the special partner is liable as a general partner even to a creditor who knew of the falsity. Sheble *v.* Strong, 128 Pa. 315, 18 Atl. 397.

certainly so as to creditors, without exception or qualification. As between the partners, their agreements might still be valid, and would then affect their mutual rights and obligations.[1]

§ 425. **Capital.** — Besides these preliminary precautions, there are others, which come into force after the partnership is established, and remain in force so long as it is in operation, which are not less important. The capital is not to be reduced during the partnership. If a special partner withdraws any part of the capital, and the firm becomes insolvent, he is liable to the creditors for the amount so withdrawn, with interest. (*j*) A withdrawal

delivery to the firm of promissory notes, which are received and treated as cash. And it was further held, that the actual cash payment, as capital, required by the statute, of one who enters a firm as special partner, must be made prior to the publication of the certificate of the formation of the firm. Pierce *v.* Bryant, 5 Allen, 91. In New York, where the certificate was made, dated, and filed, Dec. 23, 1870, which by its terms was to take effect Jan. 1st, 1871, and the special partner at the same time gave his check for the amount of his capital, dated Dec. 31, 1870, to his copartners, this was held not a cash payment. Durant *v.* Abendroth, 69 N. Y. 148. A statement in the certificate of the formation of a limited partnership, that the special partner has contributed a certain sum, when, in fact, a portion of that sum has been contributed by another person, with the design of securing the rights and benefits of a special partner without becoming one, renders all the parties liable as general partners. Bulkley *v.* Marks, 15 Abb. Pr. 454. And see Haviland *v.* Chace, 39 Barb. 283; Ward *v.* Newell, 42 Barb. 482.

(*j*) La Chomette *v.* Thomas, 1 La. Ann. 120; Bulkley *v.* Marks, 15 Abb. Pr. 454. Where, during the continuance of a special partnership, the special partner sold out his interest in the concern to the general partner, for a sum exceeding the amount of the capital he had placed in the business, and for the price of his interest so sold received a security, pledging to him all the personal property of the partnership, it was held that this, in effect, amounted to a withdrawal by him of the capital he originally contributed to the copartnership; that he had secured to him that which, by the copartnership, he had contributed in cash, and without security, to be employed in the business, and to stand as indemnity to those who should deal with the partnership; and that the transaction was, in effect, an alteration of the capital of the partnership; and the consequence prescribed by the statute ensued; viz., if the business was carried on, he was thereafter liable as general partner. Beers *v.* Reynolds, 12 Barb. 288, 11 N. Y. 97. But in Lachaise *v.* Marks, 4 E. D. Smith, 610, where there had been an agreement of dissolution, it

[1] A member of a limited partnership cannot take advantage of a defect in organization to increase the liability of other members, as between themselves. Egbert *v.* Kimberly, (Pa.) 23 Atl. 437; Allegheny Nat. Bank *v.* Bailey, 147 Pa. 111; 23 Atl. 439.

Though the organization is invalid, the body is nevertheless a partnership; and though the liability of the members is altered, all contracts with the firm remain in full force. Thus the validity of a mortgage given by a limited partnership is unaffected by defects in the organization. Briar Hill Coal & Iron Co. *v.* Atlas Works, 146 Pa. 290; 23 Atl. 326. Nor can an insurance company take advantage of a defect in the certificate to avoid a policy on the partnership goods. Clement *v.* British America Assur. Co., 141 Mass. 298; 5 N. E. 847.

or a diminution of the capital by a general partner, without the consent, or knowledge, or with ignorance through negligence, of the special partner, would not make him liable. (*k*)

§ 426. **Position of Special Partner.** — If the name of the special partner be used in any contract with his consent, and, still more, if he take an active part in the formation of any contract, he is liable upon it as a general partner. (*l*)[1]

In New York, it is provided that, if the firm make an arrangement for the payment of their debts, and therein make any preference among their creditors, or provide for the special partner as a creditor, the arrangement would be void. (*m*)

was held that the mere giving of notes, payable, at a future time, by the general partners, to the special partner, in the same name as that of the partnership, upon the making of such agreement, with a view of purchasing his interest, is not a withdrawal of capital. The receipt, by the special partner, of dividends, as a device to withdraw capital, will render him liable as a general partner; but dividends may be paid to him in good faith, with only the effect to require him to restore in case the capital shall thereby be unintentionally reduced. Id. In Robinson *v.* McIntosh, 3 E. D. Smith, 221, in a case of limited partnership, it was held, that a court of equity has power, at the suit of one partner, to compel another to contribute a sum stipulated as capital, or to restore it to the common fund, if he have withdrawn it before the debts are paid.

(*k*) See Singer *v.* Kelly, 44 Pa. 145; [Seibert *v.* Bakewell, 87 Pa. 506].

(*l*) Jonau *v.* Blanchard, 2 Rob. (La.) 513; Madison County Bank *v.* Gould, 5 Hill, 309. In this last case, the court say: "If the defendant, Gould, went beyond advising with his partners, and was actively concerned in negotiating and making the purchase of the mill, he has already rendered himself liable to answer as a general partner, so far as relates to any liability of the partnership growing out of that particular transaction And we think he must also be deemed a general partner as to all the debts and liabilities of the firm. The legislature has plainly manifested the intention of excluding the special partner from all active participation in the business of the firm; and his interference is forbidden upon the pain of losing his character and protection as a special partner. The moment he engages in the business of the firm, he violates one of the conditions on which his exemption from liability depends, and he becomes a general partner by his own voluntary act." So if he represents himself to be a general partner. Barrows *v.* Downs, 9 R. I. 446. If a special partner buys out the entire property of the firm before the limitation expires, and continues the business of the firm, he is liable as a general partner from the beginning. First Nat. Bk. *v.* Whitney, 4 Lans. 34. See Richardson *v.* Hogg, 38 Pa. 153; McKnight *v.* Ratcliffe, 44 Pa. 156. If the special terms of the partnership are violated to the advantage of the firm, the firm is liable. Johnson *v.* Bernheim, 76 N. C. 130.

(*m*) Hayes *v.* Bement, 3 Sandf. 394; Innes *v.* Lansing, 7 Paige, 583; Mills *v.* Argall, 6 Paige, 577; Whitewright *v.* Stimpson, 2 Barb. 379; Jackson *v.* Sheldon, 9 Abb. Pr. 127. But in The Artisans' Bank *v.* Treadwell, 34 Barb. 553, it was held, that, when a limited partnership becomes insolvent, its assets do not, from that time, irrespective of the condition of

[1] Where a special partner files a bill for dissolution during the term because of misconduct of the general partner, and is appointed receiver, it is not such an interference or interruption of the business as to make him a general partner. Continental Nat. Bank *v.* Strauss, (N. Y.) 32 N. E. 1066.

§ 427. **Incidents of Limited Partnerships.** — All suits must be brought by and against the general partners, unless the special

any creditor's demand, become trust funds for the benefit of all the creditors of the partnership; so as to prevent a creditor, either by superior diligence or by the favor of the partners, from acquiring or possessing a valid lien thereon in preference to other creditors. The assets of the partnership are trust funds for the benefit of the creditors equally, except such as, by superior vigilance, have obtained a lien on the property of the partnership. And they become trust funds for such mode of distribution, so far as any action of the partners is concerned, at the time of insolvency; and, so far as the action of creditors is concerned, at the time the court takes possession of the fund, either by decree or by the appointment of a receiver. Until that time, it is the right of every creditor to seek a preference, and to obtain one, if he can, by superior vigilance. In Hayes *v.* Bement, cited *ante*, in holding that, where a limited partnership becomes insolvent, and the special partner is a general partner in another firm to which the limited partnership is indebted, neither the debt due to such firm, nor such general partner's interest therein, is postponed under the provisions of the statute directing that a special partner shall not claim as a creditor against the limited partnership, of which he is a member, until the claims of all the other creditors are satisfied, — the court say: "The statute authorizing and regulating limited partnerships is strict and severe; and though, perhaps, not unnecessarily so, we are not disposed to put such a construction upon its language as would, in a great measure, impair the usefulness, if not defeat the objects intended to be accomplished by its passage. The special partner is under disabilities which are not imposed upon general partners, and, in consideration, he is relieved from liability, except to the extent of the capital which he may contribute; but as in many, if not most, of such limited copartnerships, the bulk of the cash capital is contributed by the special partner, it must generally be for his interest to sustain, as far as possible, and save the partnership when organized, and to prevent its failure or insolvency. If, endeavoring to do this, he becomes a creditor, and still the partnership fails and becomes insolvent, he loses his capital, and his debt is postponed; at the same time, he has not directed or managed its affairs. In cases of corporations, a fixed sum may be paid in as capital; that sum is all that is put at hazard. The parties contributing it may be, and generally are, the chief managers. If the stockholders loan to the corporation, they are put, in case of insolvency, upon the same footing as other creditors: their debt is not postponed. In limited partnerships, which are a kind of *quasi* corporations, the special partner, who contributes his capital, can have no voice in the management of the business; and, if he loans to the firm, his debt must be postponed to those of all the other creditors: and we are now asked to say, that, if any other firm of which he happens to be a member shall loan to such copartnership, even though it be without his knowledge, or shall, in the usual course of business or dealings, become creditors of such copartnership, and such copartnership shall become insolvent, that then the debt of the creditor firm, or, at all events, his interest in such debt, must be postponed. We confess that we do not believe the legislature so intended, and we do not think it has so said. Had the statute provided that the special partner should not, directly or indirectly, neither individually nor jointly, become a creditor, and, if he did, that then any debt due to him individually, or his portion of a debt due jointly, or his interest in any debt due to any other person or persons, corporation or corporations, or to any partnership, whether general or limited, should be postponed, the case would be different. As it now is, we consider that the legislature simply intended to put the special partner, so far as he is a creditor, upon precisely the same footing as if he were a general partner." It was further held, in this case, that where the same person is a general partner in two different firms, one of which becomes insolvent, indebted to the other, the latter may recover its debt or dividend from the insolvent or bankrupt firm.

partners have become general partners by some non-compliance with the requirements of law; in which case, they may be joined; and, if the plaintiff seeks to hold them beyond their limited liability, he must join them. (*n*) As the statute is itself exceptional, it must not be enlarged by construction; and the special partners are general partners in all things, excepting those as to which the statute expressly limits their liability. (*o*)[1] If the

Where one general partner in a limited partnership made an assignment, with the consent of the special partner, but without the consent of the remaining general partner, the assignment was set aside. Hayes *v.* Heyer, 3 Sandf. 293; White *v.* Hackett, 24 Barb. 290. It was held that, prior to the amendment in the New York statutes (ch. 414 of 1857, § 3), when a special partnership becomes insolvent, and application is made by creditors for an injunction and receiver, a special partner is entitled to come in and claim as a creditor of the partnership, and to receive a dividend, out of the assets thereof, *pro rata* with the other creditors, and that the amendment in the statute was not declaratory of the law as it previously existed. But, reversing this, it was held, in s. c. 20 N. Y. 178, on appeal, that, irrespective of the amendment to the act authorizing the formation of limited partnerships, a special partner could not, in case of the firm's insolvency, claim to share in the distribution of its assets for the reimbursement of loans or advances made by him over and above the capital he contributed, until after all others were satisfied; and that the amendment was not declaratory of the existing law, but introduced a new rule. See Fanshawe *v.* Lane, 16 Abb. Pr. 71; Van Alstyne *v.* Cook, 25 N. Y. 489; Ward *v.* Newell, 42 Barb. 482; Singer *v.* Kelly, 44 Pa. 145. See, as to the effect of the attachment of the interest of the special partner, Harris *v.* Murray, 28 N. Y. 574. The special partner cannot claim as a creditor of an insolvent firm of which he is a member. Dunning's Appeal, 44 Pa. 150. [Jaffe *v.* Krum, 88 Mo. 669. See Sherwood *v.* His Creditors, 42 La. Ann. 103, 7 So. 79; Coffin's Appeal, 106 Pa. 280.] He may in Connecticut, as to loans independent of his special capital contributed, Capp *v.* Lacey, 35 Conn. 463.

(*n*) The Artisans' Bank *v.* Treadwell, 34 Barb. 553, 560; Schulten *v.* Lord, 4 E. D. Smith, 206; [Sharp *v.* Hutchinson, 100 N. Y. 533, 3 N. E. 500]. It was held, in Louisiana, that the fact of there having existed a partnership *in commendam* between the parties does not prevent the plaintiff from recovering of the defendant sums of money paid for the use of the latter, and which were not taken from or connected with the partnership. Battaille *v.* Battaille, 6 La. Ann. 682.

(*o*) Lachaise *v.* Marks, 4 E. D. Smith, 610; Hayes *v.* Bement, 3 Sandf. 397; [Sherwood *v.* His Creditors, 42 La. Ann. 103, 7 So. 79; Jaffe *v.* Krum, 88 Mo. 669]. In Hogg *v.* Ellis, 8 How. Pr. 473, Mitchell, J., says: "The limited partner is a partner as much as the general partner; and there is nothing to prevent him, even during the continuance of the partnership, from taking an active part in its concerns, if he chooses to bring on himself the statutory consequences of a liability as a general partner. The statute is for his protection, if he will conform to it; it is not any part of its policy to prevent him from acting as a general partner, if he is willing to assume the liabilities that follow; and, if he is willing, his partners have no ground of complaint, nor the creditors of the firm, if he leave their rights unimpaired. It would be different if the general partners by their articles

[1] So they must join in an assignment of the firm property for benefit of creditors. *In re* Allen, 41 Minn. 430, 43 N. W. 382. And the location and nature of the business cannot be changed without the consent of the special partner. First Nat. Bank *v.* Clark, (Ill.) 32 N. E. 255. But a special partner cannot transact firm business, or

partnership is renewed after its expiration by its original limits, there must be a renewal of the certificate, publication and record. (*p*) [1]

§ 428. **Dissolution and Notice.** — The partnership may be dissolved by its own limitation, by the death of a partner, (*q*) by decree of court, by bankruptcy of the firm or of a partner, in the

excluded the limited partner from a control; but then this restriction might cease at the expiration of the partnership. The statute, as to the special partner, is, that 'if he shall interfere, contrary to these provisions, he shall be deemed a general partner' (1 R. S. 766, § 17), and that is the only penalty."

(*p*) Andrews *v.* Schott, 10 Barr (Penn.), 47, 53. And, if this is not done, the partnership, being continued, becomes a general one. Lachaise *v.* Marks, 4 E. D. Smith, 610, 620. If any alteration be made in the capital or shares, and the partnership be in any manner thereafter carried on, before the publication of the notice of dissolution is completed, where the limited partnership is dissolved by the agreement of the parties before the period fixed for its termination by the original certificate, the special partner becomes liable as a general partner. Beers *v.* Reynolds, 12 Barb. (S. C.), 288, and s. c. on appeal, 11 N. Y. 97. See La Chomette *v.* Thomas, 5 Rob. (La.) 172, and Gray *v.* Gibson, 6 Mich. 300, as to the effect of not recording an agreement for the formation of a limited partnership. The parties designated in articles or a will to continue a partnership, or to be interested in it, after a death, should be obliged to renew the formalities of the statute, if they would remain special partners, with the fund alone responsible; and if they continue the business without this form, then they become general partners, liable in like manner as all other dormant partners. Jacquin *v.* Buisson, 11 How. Pr. 386.

(*q*) Troubat on Lim. Part. § 430 (Phila. 1853) makes a distinction as to the death of a special partner, citing Fierli, &c. But this distinction is not sustained in this country. See Ames *v.* Downing, 1 Brad. 321 (which escaped Mr. Troubat's notice), citing several French authorities. And see also Jacquin *v.* Buisson, 11 How. Pr. 385, 395, in which is the following: "Since the decision of this motion, I have noticed the case of Ames *v.* Downing. The Surrogate of New York, in a very able and learned opinion, has arrived at the conclusion herein stated, that the death of a special partner dissolves the firm; and has gone over much of the interesting ground of the French law which I have explored. I find, also, that, in Pennsylvania, there is an express provision in the statute on the subject, for the continuance of the capital of the special partner through his representatives, for the unexpired term, or a sale of the interest, in their discretion. Purdon's Digest Laws, Penn 544, § 28." See *ante*, § 422, note (*h*).

bind the firm by attempting so to do. Columbia Land & Cattle Co. *v.* Daly, 46 Kas. 504, 26 Pac. 1042.

[1] It has been held that when a limited partnership is renewed, the new certificate need not disclose the state of the capital at the time, but only state the original contribution. Arnold *v.* Danziger, 30 F. R. 898; Fifth Ave. Bank *v.* Colgate, 120 N. Y. 381, 24 N. E. 799. But see Haddock *v.* Grinnell Mfg. Co., 109 Pa. 372, 1 Atl. 174. If there is an interval between the expiration of the partnership and its renewal, the partnership would seem to be an entirely new one, and to require the same sort of certificate as a new partnership; and during the interval between expiration and renewal the firm would be a general one. Haddock *v.* Grinnell Mfg. Co., 109 Pa. 372, 1 Atl. 174. If the amount of capital is increased, it has been held to make the partnership a new one. Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693.

same manner as a general partnership. And the special partners will be bound after a dissolution, unless notice is given; excepting where the dissolution comes by limitation of time (and then the certificate is notice), or by an act of the law. (*r*)[1] Whether dissolution, by death, or by bankruptcy, requires notice, is not so certain, and therefore the notice would be expedient. If, however, after a dissolution with notice, or a dissolution by the original limitation or by act of the law without notice, the general partners go on and issue notes bearing the old name, without the consent or permission, actual or constructive, of the special partners, these partners are not liable thereon, even to innocent and ignorant holders, for value. And, even if the special partners had made themselves liable, the holders of these notes cannot come in and claim against the joint assets equally with the previous creditors of the firm. (*s*) If, however, the special partners have made themselves liable on such notes, by permitting their

(*r*) Haggerty *v.* Taylor, 10 Paige, 261; Hogg *v.* Ellis, 8 How. Pr. 473, per Mitchell, J.: "The partnership was a limited one, and it has expired by its own limitation. In ordinary partnerships, it is a matter of course, on a bill to close the concern, after the dissolution, to appoint a receiver; and the same rule prevails if the proofs show that, at the hearing a dissolution will be granted, although the partnership has not yet expired." In Beers *v.* Reynolds, 12 Barb. 291, 11 N. Y. 97, King, J., says: "The statute relative to limited partnerships (2 R. S. 3d ed. p. 52, § 24) is in these words: 'No dissolution of such partnership, by the acts of the parties, shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the clerk's office in which the original certificate was recorded, and published, once in each week for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business, and in the State paper.' It seems to me that this statute will admit of but one construction, — that, in the case proposed, of a dissolution, by act of the parties, before the expiration of the term for which the partnership was formed, the notice must not only have been filed and recorded but the full period of publication must also have elapsed, before the partnership can be considered to be dissolved; that the partnership continues until the notice has been published for four weeks. The notice thus prescribed is similar in its nature to that by which the special partnership may be created. The period for which the partnership was to continue has been made known to the public by the filing of the original certificate and its publication in the newspapers. The notice thus given, the statute allows the parties to retract by another notice made public in a similar manner; and, until the provisions of the statute respecting this second notice have been complied with, the public are authorized to rely upon the terms of the first notice." See Marshall *v.* Lambeth, 7 Rob. (La.) 471; Bulkley *v.* Marks, 15 Abb. Pr. 454, 463; Lachaise *v.* Marks, 4 E. D. Smith, 610. Where a certificate and notice of dissolution is required by statute, it must be strictly complied with. *Re* Terry, 5 Biss. 110.

(*s*) Haggerty *v.* Taylor, 10 Paige, 261; Lachaise *v.* Marks, 4 E. D. Smith, 610.

[1] But see Tilge *v.* Brooks, 124 Pa. 178, 16 Atl. 746.

issue in that way, the remedy of the holders is by suit, against all the partners, to charge them personally. (*t*)

§ 429. **Publication of Certificate.** — Defects in the certificate, or publication or record, or in any compliance with the requirements of the law, do not vitiate, if these defects are merely formal, and such as cannot injuriously mislead any party. But if they are substantial, — that is, if they can be injurious, — they leave all the partners liable as general partners, although none of them were in fault. (*u*) [1]

(*t*) Haggerty *v.* Taylor, 10 Paige, 261 ; Schulten *v.* Lord, 4 E. D. Smith, 206, 210. In Bradbury *v.* Smith, 21 Me. 117, where a partnership was formed between A. & B., wherein it was stipulated that the partnership should be special, that B. should be the special partner, and should contribute a certain sum "as capital to the common stock for carrying on the business," which was to be conducted in the name of A. & Co. ; and the sum was paid in and invested in goods, and the goods were sold, and other goods purchased in their place with the proceeds of the sales, — it was held, that whether the partnership was to be considered as a special one, under the statute, or as a general one, the goods became partnership property ; the partnership becoming debtor to the partner advancing the capital, to the amount advanced. In Louisiana, the court held, that a partner *in commendam* is responsible to the creditors of the partnership for the amount of the capital he was bound to contribute ; and, where his portion of the capital has been withdrawn, the creditors may proceed against him by a direct action. La Chomette *v.* Thomas, 1 La. Ann. 120. Eustis, C. J., in pronouncing the judgment of the court, said : "We have recently recognized the rights of creditors to hold partners *in commendam* responsible for the amount of the capital which they were bound to put into the partnership of which they were members. Civil Code, art. 2813. We will prevent the creditors from obtaining any undue preference over each other, and, in all cases, carry into effect the principle of law which makes the *commendam* fund a common pledge for the creditors of the partnership ; but we will permit no obstacle of mere form to prevent the direct recourse of the creditor against the partner *in commendam*, whenever his obligation to contribute to the partnership debts is made out. In the present case the partner *in commendam* has not only withdrawn his capital on the dissolution of the partnership, but his share of the profits ; and why should he not pay his share of the debts ?" See further, as to the liability of the special partner, Pierce *v.* Bryant, 5 Allen, 91 ; Marshall *v.* Lambeth, 7 Rob. (La.) 471 ; De Lizardi *v.* Gosset, 1 La. Ann. 138 ; Beers *v.* Reynolds, 11 N. Y. 97. For a debt owing by all the partners, general and special, in a limited partnership, a suit is well brought against the general partners alone. And a judgment and execution in such suit, levied upon the property of the partnership, will bind the entire interest of all the partners. The provision of the statute, that suits in relation to the business of a limited partnership "may be brought and conducted by and against the general partners, in the same manner, as if there were no special partners," must be construed to mean, not only that they may be thus brought "in the same manner," but "with the same effect." The Artisans' Bank *v.* Treadwell, 34 Barb. 553. And, see Bulkley *v.* Marks, 15 Abb. Pr. 454, s. c. *nom.* Buckley *v.* Bramhall, 24 How. Pr. 455 ; Robinson *v.* McIntosh, 3 E. D. Smith, 221 ; Hastings *v.* Hopkinson, 28 Vt. 108, 117.

(*u*) Andrews *v.* Schott, 10 Barr, 47 ; Bowen *v.* Argall, 24 Wend. 496 ; Smith *v.*

[1] Failure of the proper official to record the certificate does not make the special partners liable as general partners, if they took it to the proper officer for record.

Thus, a publication that the partnership would begin on the 16th of November, when it actually began on the 16th of October, was held not to bind the special partners as general partners. But it was said that it would have bound them if the error had been intentional, or if the debt sued had been contracted before the 16th of November. (*v*)

So, a publication of the certificate was held to have been made "immediately" within the terms of the statute, when it was made within three days after the recording. And it was held sufficient, if made once in each of the succeeding six weeks. (*w*)

Where real estate was purchased by the general partners for the firm, and paid for by the firm, the circumstance that the title to the land was taken in the names of all the partners did not make the special partners liable as general partners. Stress was laid upon the fact that the special partners did not know that the land was so granted to them. But, if they did know this and consent to it, it does not seem clear, on general principles, why they should be held as general partners, provided they had complied in all things with the requirements of the law. Perhaps they should be so held, however, to the vendors, for the price of the land. (*x*)

Argall, 6 Hill, 479, 3 Denio, 435; Lachaise *v.* Marks, 4 E. D. Smith, 610. In this last case, where the certificate of the formation of a limited partnership declared "that all the general partners interested therein are A. and B., both of Brooklyn, in the State of New York, and that the special partner interested therein is C., of Jersey City, in the State of New Jersey," — it was held, that this was a compliance with the statute (2 N. Y. R. S. 4th ed. p. 174, § 4, subd. 3), requiring the certificate to contain the respective places of residence of the general and special partners, and that no more distinct averment of their being residents of those places was necessary. See also Bulkley *v.* Marks, 15 Abb. Pr. 454, s. c. *nom.* Buckley *v.* Bramhall, 24 How. Pr. 455. If the firm moves its business into another county than that where the certificate has been recorded, they become general partners till the certificate is newly recorded. Riper *v.* Poppenhausen, 43 N. Y. 68.

(*v*) The Madison County Bank *v.* Gould, 5 Hill, 309. And see Bradbury *v.* Smith, 21 Me. 117.

(*w*) Bowen *v.* Argall, 24 Wend. 496. An affidavit to accompany a certificate of a limited partnership, under N. Y. Rev. Sts. (4th ed.) p. 174, § 7, need not follow the exact words of the statute. If it clearly establishes the facts required by the statute, it is sufficient. Thus, an affidavit that the special partner has "actually paid in" the capital contributed by him, is held equivalent to an affidavit that he has paid it "in cash." Johnson *v.* McDonald, 2 Abb. Pr. 290.

(*x*) The Madison County Bank *v.* Gould, 5 Hill, 309.

Manhattan Co. *v.* Laimbeer, 108 N. Y. 578, 15 N. E. 712. But in Henkel *v.* Heyman, 91 Ill. 96, where the certificate was left a sufficient time to be recorded and then taken away without having in fact been recorded, the special partner was held liable as general partner; and it was said that the special partner must see at his peril that the requirements of the statute were carried out.

But where the certificate was published in two newspapers, and in one of them the sum contributed was said to be five thousand dollars, when in fact it was but two thousand, and the mistake was made by the printer, it was held that the special partners were liable as general partners, without proof that the creditors were misled by the mistake. (*y*)

The certificate, being duly sworn to, acknowledged, and recorded, is *primâ facie* evidence of its own truth, and may be offered as such; but has no force to rebut positive testimony of its falsehood. Thus the certificate cannot contradict, as evidence, testimony going to show that the sum actually paid in was less than that stated. (*z*)

§ 430. **Purposes for which Limited Partnerships may be formed.** — In some of the States, there seems to be no restriction as to the purposes for which these special partnerships may be formed. In others, certain objects or kinds of business are enumerated, which they may carry on. In others, some are excepted; as banking and insurance. In many of the States in which limited partnerships are permitted, banking is prohibited, except by corporations expressly authorized. But the business of insurance is generally open; and we see no reason, derivable from its nature, why a

(*y*) Argall *v.* Smith, in the Court of Errors, 3 Denio, 435, per Spencer, Senator: "The 'terms' must be truly published in two papers. Not to publish at all would be clearly fatal; and it would be equally so to publish in but one paper, or in papers in any other senate district. That the amount of the capital actually paid in by the special partner would be a substantial and material portion of the terms, cannot be doubted. It is the foundation of the credit to be given. The duty of making such publication is by the statute devolved upon the partners; and it is one that they must see to at their peril. If they fail in this, the consequence is declared in plain terms: 'the partnership shall be deemed general.' In this the courts have no discretion. They have only to declare the will of the legislature. The publication of different 'terms' in two papers, in one of which they are untruly stated, can be no better than to omit a publication altogether." See the same case in the Supreme Court, *nom.* Smith *v.* Argall, 6 Hill, 479. And see Bowen *v.* Argall, 24 Wend, 496.

(*z*) The Madison County Bank *v.* Gould, 5 Hill, 309, 315. It has been held, in Michigan, that an agreement for the formation of a limited partnership, executed under the laws of New York, but not recorded so as to become effectual for the purpose designed, has no tendency to prove an actual general partnership between the parties named in it, in the absence of extrinsic evidence to show that they had actually entered into business as partners. Gray *v.* Gibson, 6 Mich. 300. A special partner of a firm in one State is exempt from general liability on account of transactions of his firm with the citizens of another State. King *v.* Sarria, 7 Hun, 167. See also Barrows *v.* Downs, 9 R. I. 446. Where one who has given credit to a partnership which he believes to be a limited partnership, and which is known to the public as such, afterwards seeks to charge all the partners as general partners, the burden of proof to show a general partnership is on him. Whilldin *v.* Bullock, 4 W. N. C. 234.

limited partnership might not engage in it. In this country, the whole business of insurance is now so entirely in the hands of corporations, — mutual, or stock companies, or those which unite both characters, — that there is no probability of its being done or attempted by individuals or mere partnerships. (*a*)

(*a*) See *ante*, § 421, note (*d*).

CHAPTER XVIII.

OF JOINT-STOCK COMPANIES.

§ 431. **Nature and Legality of Joint-stock Companies.** — In England, where incorporation is difficult and costly, joint-stock companies are very common, and are regulated by statute. (*a*) In this country, where incorporation is in fact, though not in form, almost at the pleasure of the parties, and limited partnerships protect from indefinite loss, joint-stock companies are less frequently found. They exist, however, in many of our States, and have given rise to interesting questions.[1] In general, they are copartnerships, and are subject to the whole law of partnership. (*b*) They are, however, partnerships of a very peculiar kind.[2]

(*a*) The Joint-Stock Companies' Acts are, 7 Wm. 4 and 1 Vict. ch. 73; 7 & 8 Vict. ch. 110, 111; Companies' Clauses Consolidation Act, 8 & 9 Vict. ch. 16; Joint-Stock Banks' Acts, 7 Geo. 4, ch. 46, and 1 & 2 Vict. ch. 96; 5 & 6 Vict. ch. 85; 7 & 8 Vict. ch. 113. The later acts are, 9 & 10 Vict. ch. 28, 75; 10 & 11 Vict. ch. 78; 11 & 12 Vict. ch. 45; 12 & 13 Vict. ch. 108; 17 & 18 Vict. ch. 73; 18 & 19 Vict. ch. 133; 19 & 20 Vict. ch. 3, 47, 100; 20 & 21 Vict. ch. 14, 49, 78; 21 & 22 Vict. ch. 60, 91.

(*b*) In Williams *v.* The Bank of Michigan, 7 Wend. 542, Walworth, Ch., says: "It is well-known, that there are and have been many joint-stock, and even banking, companies which are mere partnerships, as to every person except their own stockholders; they never having been legally incorporated. Whatever name such a company may assume and use in the transaction of its business, it is a partnership, and not a corporate, designation; and every suit, upon a contract with the company, must be brought in the names of the several persons composing the firm." See The King *v.* Dodd, 9 East, 516; Holmes *v.* Higgins, 1 B. & C. 74; Hess *v.* Werts, 4 S. & R. 356; Carlen *v.* Drury, 1 Ves. & B. 157; Keesley *v.* Cadd, cited in Perring *v.* Hone, 2 C. & P. 401; Vigers *v.* Sainet, 13 La. 300; Walburn *v.* Ingilby, 1 Mylne & K. 61; Gorman *v.*

[1] In Pennsylvania no distinction is made between limited partnerships and joint-stock companies. See Briar Hill Coal & Iron Co. *v.* Atlas Works, 146 Pa. 290, 23 Atl. 326.

[2] Joint-stock companies, though authorized by statute, are partnerships, not corporations; there is no intermediate class. Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515; Ricker *v.* American L. & T. Co., 140 Mass. 346, 5 N. E. 284; McFadden . Leeka, 48 Oh. St. 513, 28 N. E. 874. Therefore it is not an artificial citizen of the State in which it is formed, and cannot sue as such in the United States courts. Imperial Refining Co. *v.* Wyman, 38 F. R. 574.

The question has been raised, whether they were not illegal on the ground that they usurp the privileges of corporations.(*c*) It never came to a decision; and we can see no ground for raising such a question, or for denying to copartners the power of regulating their own business, form, name, and rules of proceeding, at their own pleasure. (*d*)[1]

Sometimes, in our joint-stock companies, all the property is in trustees, who alone have the legal title; and the copartners, as shareholders, under an indenture which declares the trust, have the equitable or beneficial estate. In law, this might make some important differences; but much less in equity (*e*)

Russell, 18 Cal. 688; Robbins *v.* Butler, 24 Ill. 387; Tenney *v.* The N. E. Protective Union, 37 Vt. 64. Where such associations fail to become legally constituted joint-stock companies, from some informality or other, they constitute partnerships. Whipple *v.* Parker, 29 Mich. 370. They are partnerships, except as otherwise provided by statute. Moore *v.* Brink, 6 Th. & C. 227; Manning *v.* Gasharie, 27 Ind. 399. Stockholders in a business corporation, who, after expiration of their charter, continue business, and authorize contracts to be made in the name of the copartners, are partners. National Bank *v.* Landon, 45 N. Y. 419. As to when the partnership of the associates in a joint-stock company, unincorporated, begins, see Hedge's Appeal, 63 Pa. 273. Members of a corporation, to whom a certificate of organization has been duly issued, are not responsible as partners, as to liabilities contracted before they had complied with the provision ot the statutes. First Nat. Bank *v.* Almy, 119 Mass. 476. The statutes of one State having no extra-territorial efficacy, joint stockholders in that State become partners in another. Taft *v.* Ward, 106 Mass. 518. See also Gott *v.* Dinsmore, 111 Mass. 45. As to what facts would authorize a jury to find a partnership in such a case, see Taft *v.* Ward, 111 Mass. 518.

(*c*) Story on Part. § 164; Collyer on Part. 615–624, 1st ed. And see cases cited in the following note.

(*d*) In England, the Stat. 6 Geo. 1, ch. 18, enacted the year after the infamous South Sea project had beggared many persons, made it highly penal for subscribers to public undertakings to "presume to act as if they were corporate bodies, by making their shares in stock transferable," &c., 4 Bl. Com. 117; Duvergier *v.* Fellows, 5 Bing. 248, 10 B. & C. 826; Josephs *v.* Pebrer, 3 B. & C. 639; Blundell *v.* Winsor, 8 Sim. 601; Garrard *v.* Hardey, 5 M. & G. 471; Harrison *v.* Heathorn, 6 M. & G. 81. The Stat. 6 Geo. 1, ch. 18, was in part repealed by 1 Vict. ch. 73. The Act of 7 & 8 Vict. ch. 110, came into force on the first of November, 1844. A railway company was incorporated by an act before that date. Subsequently thereto, the company obtained an act for an extension line: it was held that the latter undertaking was not a partnership, the formation of which was commenced after the first of November, 1844, within the meaning of the act. Shaw *v.* Holland, 15 M. & W. 136, 4 Railw. Cas. 150. And see Baker *v.* Plaskitt, 5 C. B. 262.

(*e*) An act under which the property of a manufacturing company, including its right to call assessments and the liability of stockholders for its debts, is vested in trustees for distribution among the creditors, is a bar to a suit by a creditor against a stockholder, under an act making members of manufacturing companies liable for their debts. Walker *v.* Crain, 17 Barb. 119.

[1] A joint-stock company has been held legal at common law. Phillips *v.* Blatchford, 137 Mass. 510.

§ 432. **Characteristics of Joint-Stock Companies.** — Universally they imitate, more or less, the form and appearance of corporations. They have a common name, which is usually descriptive of their business, like that of a corporation; and does not contain or consist of the names of persons, like the name of a firm. (*f*) They have their officers, their by-laws, (*g*) and their rules of proceeding: and by these they regulate the election of officers, the transaction of business, the transfer of shares, and the like; and, generally, in the mode of transfer, forms are used like those of incorporated companies, — as, for example, certificates (or "scrip") are issued, transfers are recorded, &c.[1] They do not, so far as we know, attempt to use a common seal, and certainly have no power to do this; that is, in law, they have no common seal, and therefore cannot make a deed of any kind. (*h*)

(*f*) In Regina *v.* Registrar of Joint-stock Companies, 10 Q. B. 839, Lord Denman held, that a joint-stock company completely registered under Stat. 7 & 8 Vict. ch. 110, and thereby "incorporated," has no power thereafter to change its name. He said: "The identity of name is the principal means for effecting that perpetuity of succession, with members frequently changing, which is an important purpose of incorporation. The statute does not express any intention of changing this general principle, but, by section 25, incorporates the company by the name set forth in the deed, and declares that it shall continue *so* incorporated until it shall be dissolved." It was contended, that as partnerships were at liberty to change their style, that joint-stock companies were in the nature of trading partnerships; and that, as there was no express prohibition in the statute, they might continue to do so. But it was held, that, when the company became incorporated, its power to change its name ceased. See 2 Bac. Abr. tit. "Corporations" (C.), 1, 7th ed. A joint-stock company has no right, between the time of provisional and complete registration, to change its name; nor has a provisionally registered company a right to assume the name of a corporation. Regina *v.* Whitmarsh, 19 L. J. Q. B. 185.

(*g*) For the power of companies to make by-laws, and the limitations on this power, see Calder and Hebble Nav. Co. *v.* Pilling, 14 M. & W. 209; Chilton *v.* London and Croyden R. Co., 16 M. & W. 212; Child *v.* Hudson's Bay Co., 2 P. Wms. 309; Smith *v.* Goldsworthy, 4 Q. B. 430; Ward *v.* Society of Attorneys, 1 Collyer, 379.

(*h*) Gow on Part. 3. In England, it has been held, that, notwithstanding their statutes, joint-stock companies completely registered are bound by contracts made by a competent board of directors, though not under seal, or made in compliance with the statute, and though they cannot enforce such contracts. But persons seeking to render those companies liable on contracts made with the directors, must show their authority to bind the company, either by the provision of the registered deed of settlement, or by proof that the body of shareholders authorized particular individuals to make contracts binding on the company. A ratification by a competent board of directors will bind the company. Ridley *v.* Plymouth, &c. Grinding and Baking Co., 2 Exch. 711; Forrester *v.* Bell, 10 Irish L. 555. See Smith *v.* The Hull Glass Co., 19 L. J., C. P. 123.

[1] Where a body having these characteristics is formed it is a joint-stock company, though no reference is made in the articles to the statute authorizing such a company. People *v.* Wemple, 117 N. Y. 136, 22 N. E. 1046.

§ 433. **Effect of Agreements and Rules.** — We repeat, that we see no reason why they may not legally and innocently do all the things they usually undertake to do; nor why the courts, of law and of equity, must not apply to them the common principles, which, in the first place, permit all partners to agree upon what terms of partnership they will; and, in the second place, hold these terms to be binding upon all who agree to them, expressly or impliedly; and, in the third place, hold them to be binding upon no other persons. (*i*) It may be said, however, that the rule already repeatedly mentioned — that special agreements between partners affect third parties to whom they are known, and who deal with the partnership with that knowledge — would apply to joint-stock partnerships.

It seems to be intimated in England, that a partner in a joint-stock company, which had formed certain rules, would not in any case be liable, beyond them, to a third party who had traded with the company with a knowledge of these rules. This impression (for it can hardly be called more) seems to be derived, in some measure, from the statutory existence and regulation of joint-stock companies in England. (*j*) In this country, we know neither reason nor authority for qualifying, in reference to these companies, the general principles of partnership on this point. That is, we do not believe that a joint-stock company, or any other partnership, can limit its own liabilities, and become a corporation or limited partnership by its own act, and without any regard to the formalities or requirements of the law; but we see no reason why a joint-stock company may not go as far as a common partnership in this direction. (*k*)

(*i*) See Hess *v.* Werts, 4 S. & R. 361; Skinner *v.* Dayton, 19 Johns. 537; Blundell *v.* Winsor, 8 Sim. 601; Walburn *v.* Ingilby, 1 Mylne & K. 61, 76; *In re* Sea, F. & L. Ass. Soc., 5 De G. M. & G. 465, *In re* Worcester Corn Ex. Co., 3 De G. M. & G. 180; Hallett *v.* Dowdall, 18 Q. B. 2; Penn. Ins. Co. *v.* Murphy, 5 Minn. 56; Henry *v.* Jackson, 37 Vt. 431.

(*j*) Blundell *v.* Winsor, 8 Sim. 601; Walburn *v.* Ingilby, 1 Mylne & K. 51, 76.

(*k*) In Hess *v.* Werts, 4 S. & R. 366, which is a highly instructive case on this question, where an association gave notes promising to pay certain amounts out of their joint funds, it was held, that all the shareholders were personally liable. After considering the special facts relating to the articles of association, Duncan, J., observed: "Nor would I have any difficulty were the articles of association more explicit than they are, and excluded from responsibility the associators, other than out of their joint funds; for though they might, as between themselves, stipulate with each other for this contracted responsibility, yet as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted. For partners in a stock divided into shares, and transferable (but who are not incorporated), are responsible beyond the amount of the shares to which they subscribe, though it is one of the terms of the association they shall not be." In the same case, Gibson, J., said: "By the

§ 434. **Position of a Member.** — Excepting so far as the liability of a partner in one of these companies is so qualified, he is — although he may call himself not a partner, but a stockholder — liable precisely as a partner. (*l*)[1]

terms of their notes, the defendants engaged to pay 'out of their joint funds, according to their articles of association,' and it is made part of the case that they have no joint funds. Shall they be compelled to pay out of their separate estates? It is a general principle, that partners are liable to third persons as for a personal debt. It is not merely the stock they bring into the partnership that is hazarded; but they are responsible to the extent of their individual fortunes; and such responsibility cannot be limited by any proviso in the articles of partnership, or agreement between themselves. But I see no reason to doubt but they may limit their responsibility by an explicit stipulation made with the party with whom they contract, and clearly understood by him at the time." King *v.* Dodd, 9 East, 527. And see Skinner *v.* Dayton, 19 Johns. 537. The directors of a joint-stock company, unless restrained by act of Parliament or the deed of settlement, would seem to have all the authority given to partners at common law; and, therefore, where parties contract with the directors in matters relating to the copartnership business, they are not bound, when seeking to enforce such contracts, to show that the directors were authorized by the deed or by-laws to enter into them. Smith *v.* The Hull Glass Co., 19 L. J., C. P. 123. See Thompson *v.* Wesleyan Newspaper Association, 19 L. J., C. P. 114; Tyrrell *v.* Washburn, 6 Allen, 466.

(*l*) See *ante*, § 431, note (*b*); Pipe *v.* Bateman, 1 Iowa, 369; Babb *v.* Read, 5 Rawle, 151; Attorney-General *v.* Heelis, 2 Sim. & St. 67; McGill *v.* Brown, Baldwin, C. C. 66; Thomas *v.* Elmaker, 1 Pars. Cas. 108; Lloyd *v.* Loaring, 6 Ves. 773; Cullen *v.* The Duke of Queensbury, 1 Bro. Ch. Cas. 103; Pearce *v.* Piper, 17 Ves. 1; Cockburn *v.* Thompson, 16 Ves. 321; Beaumont *v.* Meredith, 2 Ves. & B. 180; Keasley *v.* Codd, 2 C. & P. 408, note; Carlen *v.* Drury, 1 Ves. & B. 154, 157; Tappan *v.* Bailey, 4 Met. 535. But see, for a limitation on the law of partnership, as applied to joint-stock companies, Cox *v.* Bodfish, 35 Me. 302; Livingston *v.* Lynch, 4 Johns. Ch. 573; Irvine *v.* Forbes, 11 Barb. 588. Where, by an act of Parliament, a company was to apply the first moneys received under the act in discharge of the expenses incurred in obtaining the act, it was held, that the plaintiff, though a member of the company, might sue them for his time and trouble and money expended in obtaining the act. Carden *v.* The General Cemetery Co., 5 Bing. N. C. 253. See Tilson *v.* Warwick Gas Light Co., 4 B. & C. 962. A member of a joint-stock company, like a member of an ordinary partnership, may recover compensation for service rendered to the company previous to his having become a member of it. Lucas *v.* Beach, 1 M. & G. 417. In general, however, an action cannot be maintained by a member against the company, or by the company against a member, on a contract between him and the company. Neale *v.* Turton, 4 Bing. 149; Wilson *v.* Curzon, 15 M. & W. 532; Holmes *v.* Higgins, 1 B. & C. 74; Goddard *v.* Hodges, 1 Cr. & M. 33, 3 Tyrw. 209; Teague *v.* Hubbard, 1 Man. & R. 369, 8 B. & C. 345; Chadwick *v.* Clarke, 1 C. B. 700; Moneypenny *v.* Hartland, 1 C. & P. 352, 2 C. & P. 378; Parkin *v.* Fry, 2 C. & P. 311; Milburn *v.* Codd, 1 Man. & R. 238, 7 B. & C. 419; Perring

[1] No member of a joint-stock company has such power as a general partner. All business must be done or authorized by vote of the board of directors. Pittsburg Melting Co. *v.* Reese, 118 Pa. 355, 12 Atl. 362. The business cannot be altered or extended without the consent of all the members; though in ordinary affairs of business a majority of the directors may bind the company. McFadden *v.* Leeka, 48 Oh. St. 513, 28 N. E. 874.

§ 435. **Transfer of Membership.** — There is one difference which we incline to think the law would make between a common partnership and a joint-stock company. It is as to dissolution by change. We have already remarked that it is very possible, that, where a stockholder sold and transferred his share or interest in all respects as the rules required, giving up his certificate, and a new one was made to his transferee, the law would hold that this change operated no dissolution, but that the new partner or stockholder came into the place of the old one, and the partnership or company went on. (*m*) And the same thing might occur in a case of a change by death. We should say, however, with much confidence, that the company were still a partnership, and like a partnership in the following respects: —

First. Any stockholder might transfer his interest in any way which would operate a transfer at common law, and pay no regard to the rules of the company, and yet give good title to the transferee, so far as the property was concerned. (*n*)

v. Hare, 4 Bing. 28. But see Davies *v.* Hawkins, 3 M. & S. 488. [It has been held that a member of a joint-stock company may bring suit against it on a note, not being given for dividends. MacGeorge *v.* Harrison Chemical Mfg. Co., 141 Pa. 575, 21 Atl. 671.] The stockholders of a banking association doing business under ordinary copartnership articles are not dormant partners, although only the name of the bank is disclosed to the public. They are responsible till notice of retirement; and a new stockholder is not liable for debts contracted before he became a member of the firm. Shamburg *v.* Ruggles, 83 Pa. 148.

(*m*) Adams' Eq. (3d Am. ed.) 544; Young *v.* Keighly, 15 Ves. 577; Duvergier *v.* Fellows, 5 Bing. 248; Blundell *v.* Winsor, 8 Sim. 605; Harrison *v.* Heathorn, 6 Scott N. R. 735, 12 L. J. C. P. 282; Pinkett *v.* Wright, 2 Hare, 120, 130. If several persons subscribe an agreement, *inter se*, to promote a joint undertaking, one of them cannot withdraw his name, and discharge himself from the engagement, without the consent of the rest. And if an act of Parliament pass for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the act, by having, during the progress of the bill, renounced before the committee all further connection with the undertaking, and desired that his name might be, in consequence, omitted in the act; nor can the circumstance of his name being so omitted have the effect of disengaging him. Kidwelly Canal Co. *v.* Raby, 2 Price, 93. See Scott *v.* Berkeley, 3 C. B. 925; Stimson *v.* Lewis, 36 Vt. 91.

(*n*) See Pratt *v.* Hutchinson, 15 East, 511; Rex *v.* Webb, 14 East, 406; Josephs *v.* Pebrer, 3 B. & C. 639; Fox *v.* Clifton, 9 Bing. 115, 6 Bing. 776. Where a company was formed, by act of Parliament, for the purchase of lands to make a canal, and the act declared that the shares shall be deemed personal estate, and shall be transmissible as such, "it was held, that, though the profits arose out of the land, the shares were personal property, passing, as such, to the assignees on the bankruptcy of a proprietor." *Ex parte* Lancaster Canal Co., 1 Deac. & Ch. 411, Mont. 116. See Bradley *v.* Holdsworth, 3 M. & W. 422; Bligh *v.* Brent, 2 Y. & C. 268. Where an act prescribes certain forms in the transfer of shares, unless they are strictly complied with the shares remain in the order and disposition of the proprietor; the ordinary mode of transferring not constituting an equitable mortgage. *Ex parte* Lancaster Canal Co., *ante*.

Secondly. That this transferee would neither be a partner by such irregular transfer, nor have any claim against the company to be a partner. (*o*)

Thirdly. This transferee, or an execution creditor of a copartner, member, or stockholder, might require an account and settlement, so far as to ascertain his rights and the value of his share; but would have no right to any particular thing *in specie*, nor to a division of the effects; and a court of equity would probably deny him a sale of the whole, if a fair equivalent for his ascertained share were offered him in money. (*p*)

Fourthly. If a stockholder transferred his share agreeably to all the rules of the company, the company might, nevertheless, with or without reason, refuse to accept the transferee as a partner, and withhold his certificate. That is, they might do so, so far as to prevent his becoming a copartner; for we should say that the company was still so far a partnership and not a corporation, that without the assent of the members no person could become a partner. If the new certificate were issued, and no objection made, their assent would be implied; but, if it were expressly withheld, we should say the transferee did not become a partner. He was still a transferee of the property, and this he might realize without joining the company. So, too, if the company were willing to receive him, and the transferee were not willing to join them, we should say he was no partner, although he held the transferred interest. (*q*)

It would always be possible that the articles of agreement might be such as to give to the transferrer, or possibly to the transferee, a suit at law for damages, or at equity for perform-

(*o*) Bray *v.* Fromont, 6 Madd. 5; Jefferys *v.* Smith, 3 Russ. 158; Kingman *v.* Spurr, 7 Pick. 235, 238; Gilmore *v.* Black, 11 Me. 488; Putnam *v.* Wise, 1 Hill, 234; Murray *v.* Bogart, 14 Johns. 318; Marquand *v.* New York Manuf. Co., 17 Johns. 535; Griswold *v.* Waddington, 15 Johns. 82; Moddewell *v.* Keever, 8 W. & S. 63. See Hare *v.* Waring, 3 M. & W. 362; Harper *v.* Raymond, 3 Bosw. 29, 7 Abb. Pr. 142; Pratt *v.* Hutchinson, 15 East, 511.

(*p*) Kingman *v.* Spurr, 7 Pick. 235; Mason *v.* McConnell, 1 Whart. 381; Putnam *v.* Wise, 1 Hill, 234. See Burnes *v.* Pennell, 2 H. L. Cas. 497. The assignee of a stockholder in an insolvent corporation succeeds to the same rights and liabilities as attached to his assignor. James *v.* Woodruff, 2 Denio, 574. And see Weald of Kent Canal Co. *v.* Robinson, 5 Taunt. 801; Blount *v.* Hipkins, 7 Sim. 51. As to the power of a bond creditor of a company to inspect their books, see Pontet *v.* Basingstoke Canal Co., 2 Scott, 543; Hill *v.* Manchester and Salford Water Works Co., 5 B. & Ad. 866; Clarke *v.* The Imperial Gas Co., 7 Bing. 95, 4 B. & Ad. 315.

(*q*) See Jefferys *v.* Smith, 3 Russ. 158; Harper *v.* Raymond, 3 Bosw. 29; Tatam *v.* Williams, 3 Hare, 347; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Marquand *v.* The New York Manuf. Co. 17 Johns. 525.

ance, if the company refused to receive him. But still their refusal would prevent his being a partner. So, too, the articles might be such as greatly to qualify the transferee's right to hold or realize the interest consigned to him, if he refused to become a stockholder. But still he would not become one, by the mere transfer, without consent on his part. Possibly the rules might be such, that accepting the transfer accepted the partnership; but, even then, an execution creditor of the partner, or one buying the share on a sale by the officer, would take the interest, we think, and not be a partner without his own consent and act. (*r*)

§ 436. **Partnerships analogous to Joint-stock Companies.** — In some parts of this country, there are partnerships which, without being strictly joint-stock companies, are more like them in their articles and regulations and manner of conducting business than common mercantile copartnerships; as, for example, the mining partnerships of California. (*rr*)

(*r*) 1 Pars. on Con. (5th ed.) 144; Pratt *v.* Hutchinson, 15 East, 511; Rex *v.* Webb, 14 East, 406; Josephs *v.* Pebrer, 3 B. & C. 639; Fox *v.* Clifton, 9 Bing. 115, 6 Bing. 776; Young *v.* Keighly, 15 Ves. 557; Duvergier *v.* Fellows, 5 Bing. 248; Blundell *v.* Winsor, 8 Sim. 601; Harrison *v.* Heathorn, 6 Scott N. R. 725, 12 L. J. C. P. 282; Pinkett *v.* Wright, 2 Hare, 120, 130; Mathewson *v.* Clarke, 6 How. 122.

(*rr*) A leading case on this subject is Settembre *v.* Putnam, 30 Cal. 490. Such partnerships, when there are no partnership articles, are subject to the ordinary law of partnership, except so far as general usages of persons engaged in similar pursuits, or the known practice of the particular company, has established a different rule; the only differences generally existing being such as flow from the fact that in such partnerships there is no *delectus personæ*. Jones *v.* Clark, 42 Cal. 180; Taylor *v.* Castle, 42 Cal. 367. See also, McConnell *v.* Denvers, 35 Cal. 365.

CHAPTER XIX.

BUSINESS COMBINATIONS AND "TRUSTS."

§ 437. **Business Associations other than Partnerships.** — Having completed the study of partnerships, properly so called, we may now find it useful to study a new sort of association of capital and skill which has recently come into prominence. There may well be such associations which are not partnerships. As was said by Brett, L. J., in Smith *v.* Anderson:[1] "I confess I have some difficulty in seeing how there could be an association for the purpose of carrying on a business which would be neither a company nor a partnership; but I should hesitate to say that, by the ingenuity of men of business, there might not some day be formed a relation among twenty persons which, without being strictly either a company or a partnership, might yet be an association."

The last few years have been years of experiment as well in the domain of trade as in that of science. New forms of combination for the purposes of trade and commerce have been invented and tried, and many of them already discarded as useless. Meanwhile a few of these novel instruments of trade have attained permanent importance, and are well worth more or less careful study.

The most important and recent of these associations is known as the "trust." It will be best to examine at some length the different sorts of combination, varieties of the "trust," by means of which the trading trust has been gradually evolved.

§ 438. **Functions of a Trust.** — What may be called the legitimate functions of a trust, in the modern commercial sense, are three. In the first place, a trust, like a corporation or a joint-stock association, secures the collection of a large amount of capital into the control of a single body, and thus enables that body to secure all the advantages of large wholesale dealings with a small proportional cost of management. In the second place, like a corporation, it secures (or is believed to secure) personal immunity from liability for the individual contributors. In the third place, it permanently secures the services about the business of the ablest men in that line of business.

[1] 15 Ch. D. 247, 277.

§ 439. **Corporate Trusts.** — The earliest sort of combination which was to result in the trust seems to have taken the form of a corporation. Perhaps the latest conspicuous example of this sort was "The Crédit Mobilier of America," a corporation by means of which much of the Union Pacific Railroad was built.[1] The capitalists who furnished the funds for building the road did so through this corporation, to which was transferred the contract for building the road. The corporation, however, acted as a mere trustee, the work not apparently being done under its direction. The object of this arrangement was clearly to secure for the capitalists the profits of the contract without subjecting them to any liability.

§ 440. **Trusts for Investment.** — Of a somewhat similar nature, though without the intervention of a corporation, was a sort of trust soon after invented in order to secure a large capital for investment in commercial securities. The money contributed was put into the hands of trustees who (under the direction of the contributors) bought and held certain stocks and bonds. Certificates were issued to the contributors for the amount of their respective contributions, and after principal and interest had been repaid from the income or sale of the stocks and bonds, the profits, if any, were divided among the certificate holders. The word "trust," in the modern commercial sense, was perhaps first used in connection with this form of dealing.[2] The same device was used for the purchase and improvement, in the name of trustees, of large tracts of land, afterwards divided among the certificate holders.[3]

§ 441. **Car Trusts.** — Another of the earlier sorts of trust was the so-called "Car Trust." This, like the Crédit Mobilier, was a method of securing to certain capitalists (whether stockholders in the contracting railroad or not) the benefit of a contract with a railroad company without the liability to loss. If a railroad company needed rolling-stock, but was unable to pay cash for it, an association of capitalists was formed called a "Car Trust," which bought the cars, and sold them to the railroad company under a contract by which the company should pay for them in annual instalments, and the title should be retained until full payment was made. The title to the cars and the right to

[1] See Crédit-Mobilier *v.* Com., 67 Pa. 233; U. S. *v.* Union Pacific R. R. 98 U. S. 569.

[2] See Smith *v.* Anderson, 15 Ch. D. 247 (C. A.), "Submarine Cables' Trust;" Johnson *v.* Lewis, 6 F. R. 27, "Municipal Trust."

[3] Wigfield *v.* Potter, 45 L. T. Rep. 612; Crowther *v.* Thorley, 32 W. R. 330; *In re* Siddall, 29 Ch. D. 1 (C. A.).

receive the instalments of payment was often given to still a third body, such as a bank.[1]

§ 442. **Voting Trusts.** — A voting trust is formed when part (usually at least a majority) of the stockholders in a corporation place their shares in the hands of trustees, receiving therefor receipts. The object and result of this transaction is that the trustees are enabled to cast a majority or other large proportion of the votes of the corporation, and thus to direct its policy.

§ 443. **Trusts for carrying on Business.** — The recently invented commercial "trust" attempts to accomplish much more than the combinations already described, though it would seem to have grown out of such combinations as the "Cables' Trust."[2] The earliest example was the Standard Oil Trust, said to have been invented by S. C. T. Dodd, Esq.[3] This was a combination of most of the producers of mineral oil in the eastern United States. These, if individuals, conveyed their property to certain trustees; in the case of corporations. the stockholders conveyed their stock to the same trustees. In return for the property conveyed, they received certificates showing their interest in the concern. The whole business was thereupon carried on by the trustees, who divided the profits among the certificate holders.[4] The immediate business success of this venture induced the formation of a great quantity of such trusts, of which the most important is, perhaps, the Sugar Trust.[5]

§ 444. **"Pooling" and other Agreements between Carriers.** — Other forms of combination have been found efficient, of which the most important is perhaps "pooling," so called. The usual object of pooling is to maintain rates, that is, to prevent such competition among competing railroads as should result in a ruinous lowering of rates by one or all of the roads. Pooling of earnings was forbidden by the Interstate Commerce Act.[6] But that act did not affect other kinds of pooling. An important agreement of this sort was formed by the railroads in the Western

[1] Ricker *v.* American Loan & Trust Co., 140 Mass. 346; and see Mills *v.* Hurd, 29 F. R. 410. For a case where the transaction was held to be a colorable device to evade a mortgage, and the mortgagees were preferred, see Central Trust Co. *v.* Ohio Central R. R., 36 F. R. 520.

[2] *Ante*, § 440.

[3] See Cook on Stock (2nd ed.), § 503 *a*.

[4] See State *v.* Standard Oil Co. (Ohio), 30 N. E. 279.

[5] People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834. See, for instances of other such trusts, Gould *v.* Head, 38 F. R. 886; American Biscuit & Mfg. Co. *v.* Klotz, 44 F. R. 721; People *v.* Chicago Gas Trust, 130 Ill. 268, 22 N. E. 798; State *v.* Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155.

[6] Act of Feb. 4, 1887.

United States in the year 1889.[1] It provided that each railroad party to it should appoint an agent, to represent it in an Association, and that this Association should have power to fix rates and make rules as to competitive traffic, and to fine any member which should "cut" rates.

Carriers by sea, as well as railroads, have found it useful to make similar agreements. An instance is an agreement by which the owners of vessels formed an association to determine the number of vessels to be sent to certain loading ports, and the division of cargo and freight between them; and to prevent the agents of members of the association from acting in the interest of competing owners.[2]

§ 445. **Legal Nature of Trusts to hold Property.** — Upon the invention of these forms of association, it became a question what was the legal nature of the transaction. Such combinations as railroad pools and voting trusts are merely ephemeral, and have no legal individuality; but the property-holding and commercial trusts are more or less permanent, and might well be held to possess a distinct legal character.

The Car Trusts have been held to be joint-stock partnerships.[3] In England, on the other hand, it has been decided that the property-holding trusts are not partnerships or joint-stock associations for carrying on business, and are therefore not illegal under the Companies Act.[4] And this would seem to be the better view. In the first place, as is pointed out in the English cases, the certificate holders cannot be said to carry on any business either personally or by an agent. The business is done exclusively by the board of trustees, not by the certificate holders. The trustees, being legal owners, act as principals and in their own names, and in no sense as agents of the certificate holders. This reason applies, no doubt, with more force to the English property-holding trusts than to the Car Trusts. But the reason now to be stated is equally applicable to both. These trusts should not be held to be partnerships, because the object of them is not to carry on business for a profit.[5] The object of the Car Trusts is to repay the loans of the certificate holders, with interest, and when that has been done the trust ceases to exist.[6] The object of the trusts to hold

[1] U. S. *v.* Trans-Missouri Freight Association, 53 F. R. 440.

[2] Mogul S. S. Co. *v.* McGregor, [1892] A. C. 25.

[3] Mills *v.* Hurd, 29 F. R. 410; Ricker *v.* American Loan & Trust Co., 140 Mass. 346.

[4] Smith *v.* Anderson, 15 Ch. D. 247 (C. A.); *In re* Siddall, 29 Ch. D. 1 (C. A.).

[5] *Ante*, § 61.

[6] But see the language of C. Allen, J., in Ricker *v.* American Loan & Trust Co.,

mercantile securities is to purchase and hold a single article of property, and at last either to divide this property among the beneficiaries or to sell it and divide the proceeds. The object of the trustees is to invest, not to trade.[1] And the trusts for the purpose of buying, improving, and dividing real estate are clearly not partnerships, since the only object is to divide among the beneficiaries the property purchased.[2] These associations, therefore, are more properly regarded as agreements between the co-owners of property.[3]

§ 446. **Nature of Trusts to carry on Business.** — The nature of the commercial trusts is different. They are formed for the express purpose of carrying on business and making and dividing a profit. They possess therefore all the requisites of partnerships.[4] But such a partnership is in many respects peculiar. The legal owners of the property are the trustees, who carry on the business. Neither the corporations which may have been absorbed in the trust nor the individual certificate holders have title to the property of the association or control over the business. The certificate holders, therefore, are not the partners.[5] The

140 Mass. 346, 349. "Since this association is not a corporation, its members must be partners, unless, indeed, as the defendant contends, they are simply co-owners. But we cannot look upon them as simply co-owners. Whitman *v.* Porter, 107 Mass. 522; Hoadley *v.* County Commissioners, 105 Mass. 519; Gleason *v.* McKay, 134 Mass. 419, 425."

[1] Smith *v.* Anderson, 15 Ch. D. 247 (C. A.).

[2] Wigfield *v.* Potter, 45 L. T. Rep. 612; Crowther *v.* Thorley, 32 W. R. 330; *In re* Siddall, 29 Ch. D. 1 (C. A.).

[3] Johnson *v.* Lewis, 6 F. R. 27, per Caldwell, D. J. "The trust was not a corporation or joint-stock company or partnership, but a trust formed by deed of settlement for the purpose of securing investments. The trustees were the legal owners of the trust property, and the business of the trust was managed by them and 'the committee' created by the deed for the benefit of the certificate holders, who were strangers to each other, and who entered into no contract between themselves, nor with any trustee on behalf of each other, and were not therefore partners."

[4] "It [the Refining Co. which had become a member of the Sugar Trust] has helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations." Finch, J., in People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834.

[5] This will explain the language used by the court in Rice *v.* Rockefeller, 134 N. Y. 174, 31 N. E. 907, which should be compared with the language of Finch, J., quoted in the last note. In Rice *v.* Rockefeller, Bradley, J., said: "The Standard Oil Trust represents a voluntary association. It was created by agreement of the stockholders of various corporations and others engaged or interested in a certain enterprise, and the several branches of business connected with and incidental to it. The effect of its creation is the concentration of supervisory power in nine trustees, whose certificates of the trust are taken in place of the stock and bonds of the several corporations. The characteristic feature of it is in the voluntary surrender of the control and management of the business of those corporations, and in the fact that for its contin-

position of the parties is the same as that occupied by the trustee and beneficiaries under the will of a partner in which the trustee is empowered to continue the business for the benefit of the testator's family. We have seen that the trustee becomes personally liable, and that the beneficiaries are not liable as partners.[1] So, in the case of the trust now under consideration, the trustees are partners, and are liable as such to all those who have dealings with the business. The certificate holders are under no individual liability as partners.

§ 447. **Legal Status of a Certificate Holder.** — The holder of a trust certificate is therefore not a partner; nor is he in the same position as a stockholder in a corporation, though the analogy is close. He has no claim at law upon any person or property. The certificate is a mere declaration of trust by the trustee in his favor. If a certificate is transferred, it is the transfer of equitable property; in other words, a transfer of the claim of a *cestui que trust* against his trustee. The form requisite for such a transfer may of course be regulated by the declaration of trust. Consequently when the original agreement, to which each certificate refers, provides for a sale of the certificates and a transfer on the books, such a sale passes a valid title in equity, and the purchaser may compel a transfer according to the original trust agreement.[2]

But though the certificate holders are therefore under no legal liability to one dealing with the trust, it is conceivable that they might nevertheless be forced to contribute in case of an unsuccessful business. It is a general principle of the law of trusts that a trustee is entitled to reimbursement from the *cestui*;[3] and therefore if the business were not successful, and the trustees were obliged to pay debts, they would be entitled to contribution from the certificate holders. And under some circumstances, such as loss of all the trust property and insolvency of all the trustees, creditors of the trust might proceed in equity directly against the

uance it has the capacity of succession. The agreement constituted not a partnership, but a trust in behalf of the beneficiaries. And while it is not a corporation, it, by the agreement, took some of the attributes of a corporation in so far that, through its trustees, certificates of shares in the equity to the property held by them were issued, and were transferable in like manner, apparently, as are those of corporations." The language of these extracts, taken literally, seems contradictory; but taking them in connection with the issues in the respective cases, it is submitted that the meaning of the court is as stated in the text.

[1] *Ante*, § 356; Connally *v.* Lyons, 82 Tex. 664.

[2] Rice *v.* Rockefeller, 134 N. Y. 174, 31 N. E. 907.

[3] 2 Perry on Trusts, §§ 910, 913.

certificate holders.[1] It is not therefore strictly correct to say that the certificate holders are as free from liability as the stockholders of a corporation: it is true at law, but not in equity.

§ 448. **Advantages and Disadvantages of Trusts.** — The economic advantages of a properly administered trust are obvious. The economy in administration, the saving of all the expenses and waste of competition, and the gain from having all the business done under a single management, and that the best attainable, render the trust an invention of great possible value. The success of a few trusts shows what may be accomplished by this form of business. But the difficulties in the way of successful administration are so great that few trusts are able to overcome them. In the first place, the trustees must be men of the highest business ability; and such men will usually prefer to work for their own interests, rather than to enter into the service of a great combination. The temptation to make use of questionable methods, such as "stock-watering," is also great; indeed, the trust itself must usually be formed upon a vastly inflated estimate of the value of its constituent parts. And the individual liability of the trustees is such as few men would be willing to undergo. As a result of these difficulties, successful trusts are likely to be few.

§ 449. **Legality of Trusts.** — So far as the combination itself is concerned, a pool or trust is perfectly legal. It is of the same general nature as a partnership; differing chiefly in the fact that a larger amount of capital can be collected than is possible in the case of an ordinary partnership. If the trust attempted to act as a corporation it would of course be illegal; but it arrogates no corporate function. There is no attempt, for instance, to limit liability. Joint stock is issued, to be sure, as in the case of corporations; but the issue and transfer of the certificates has even less effect than in the case of joint-stock companies. The issue or transfer of a share in a joint-stock company makes the new shareholder a partner, and a party therefore to all contracts made by the company. In the case of a trust, the certificate holder, as we have seen, is not a partner or a party to any contract of the trustees. Legally the trust is a partnership between the trustees, and if it may be lawfully formed it would seem to present no legal difficulties or peculiarities. If the combination is illegal, it must be for one of the reasons now to be set forth.

[1] See Fairland *v.* Percy, L. R. 3 P. & D. 217; *In re* Johnson, 15 Ch. D. 548; Norton *v.* Phelps, 54 Miss. 467; Ferris *v.* Myrick, 44 N. Y. 315, 325; Cater *v.* Everleigh, 4 Des. 19; Manderson's Appeal, 113 Pa. 631.

§ 450. **Illegality of Combinations of Corporations.** — We have seen [1] that corporations have no right to enter into a partnership; the principal reason being, that it is a breach of their charter to come under any direction except that of their stockholders and the directors elected by them. It is true, as we have just seen, that in entering into a trust a corporation does not become a member of a partnership; but the result is quite as much a breach of the charter. The method pursued has been to convey to the trustees all the stock in the corporation, who thereupon issue trust certificates to the stockholders. Although the corporation is nominally not a partner, the result is that the trustees, a body of strangers, secure control of the corporation and use it, not for the benefit of its stockholders, but of the whole body of holders of trust certificates. This is in effect contrary to the spirit of the charter, and is illegal.[2] If there were no other objection to the

[1] *Ante*, § 24.

[2] Gould *v.* Head, 38 F. R. 886; People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834; State *v.* Standard Oil Co. (Ohio), 30 N. E. 279; Mallory *v.* Hanauer Oil Works, 86 Tenn. 598, 8 S. W. 396. In People *v.* North River Sugar Refining Co., Finch, J. said "It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control.

"When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends, whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed 'overproduction.' In all these respects it has wasted and perverted the privileges conferred by its charter, abused its powers and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations. The State permits in many ways an aggregation of capital, but, mindful of the possible dangers to the people, overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. . . .

"As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital

course, it would seem to be illegal, because by adopting it the trustees would be enabled to do all their business through the corporations parties to the trust, and thus altogether escape the individual liability to which we have seen they are subjected.

It is, however, perfectly feasible to create a trust, into which may be absorbed the property and business of corporations, which may yet be legal in spite of that fact. Each corporation has power to close up its business and sell out all its assets. This might be done in such a way that the trustees should acquire title to the assets, giving in payment to the corporation either trust certificates or cash realized from the sale of certificates. The corporation, upon paying its debts and dividing the balance of its assets among the stockholders, might then be wound up.

§ 451. **Illegality of Combinations in Restraint of Trade.** — Another ground upon which trusts are often held illegal is that the agreement by which they are formed operates in restraint of trade, by fostering monopoly.[1] It seems to be well settled that a monopoly is illegal, being in restraint of trade; but there seems to be some difficulty in deciding what combination is sufficiently a monopoly to be held illegal. Where it is not in the power of

they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength, and in their power over industry, any possibilities of individual ownership; and the State, by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another . . .

"We are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; but that manufacturing corporations must be and remain several as they were created, or one under the statute."

[1] State *v.* Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155; State *v.* Standard Oil Co. (Ohio), 30 N. E. 279.

the parties to an agreement to gain exclusive control of a business, the agreement cannot be said to establish a monopoly. Thus it has been held legal for ship-owners to combine to regulate prices.[1] So where the two principal manufacturers of washing machines agreed to combine, this was held legal, for it was not in their power to establish a monopoly.[2] On the other hand, a combination of all coal miners in a certain region has been held illegal, as creating a monopoly,[3] and the same has been held as to a combination of all the grain dealers in a certain place, which was found to be a monopoly in fact, and to have been so intended.[4] It has been decided that a combination of all distillers in a certain region is an illegal monopoly,[5] and the same has been held in Ohio of the Standard Oil Co.[6] So a combination of all salt manufacturers has been held illegal.[7] Perhaps the strongest case is that of an agreement of a number of firms in New Orleans, who imported and sold India bagging, not to sell any except by consent of a majority of the firms. This was held illegal.[8] The question whether or not a certain association creates a monopoly would seem to be best treated as a question of fact, to be decided in each case as the facts might appear.[9]

§ 452. **Illegality of Combinations affecting Necessaries of Life.** — Certain combinations may however be illegal, although not complete monopolies, if they tend to limit the supply or increase the price of the necessaries of life.[10] This principle is very broadly

[1] Mogul S. S. Co. *v.* McGregor [1892] A. C. 25. See U. S. *v.* Trans-Missouri Freight Association, 53 F. R. 440.

[2] Dolph *v.* Troy Laundry Machinery Co., 28 F. R. 553.

[3] Morris Run Coal Co. *v.* Barclay Coal Co. 68 Pa. 173.

[4] Craft *v.* McConoughy, 79 Ill. 346.

[5] State *v.* Nebraska Distilling Co., 29 Neb. 700, 46 N W. 155.

[6] State *v.* Standard Oil Co. (Ohio), 30 N. E. 279.

[7] Ohio Salt Co. *v.* Guthrie, 35 Oh. St. 666.

[8] India Bagging Association *v.* Kock, 14 La. Ann. 168.

[9] "'Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. Rousillon *v.* Rousillon, 14 Ch. D. 351; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345. 'Cases must be judged according to their circumstances,' remarked Mr. Justice Bradley, in Oregon Steam Navigation Co. *v.* Winsor, 20 Wall. 64, 68, 'and can only be rightly judged when the reason and grounds of the rule are carefully considered.'" Fuller, C. J., in Gibbs *v.* Baltimore Gas Co., 130 U. S. 396, 409. "The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void." Agnew, J., in Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173.

[10] "The ordinary rule, that contracts in partial restraint of trade are not invalid, does not apply to corporations like appellant and appellee [gas light companies],

and generally stated, and appears to be of great importance in connection with this subject. Several decisions holding trusts or combinations illegal have been rested upon it. Thus a combination of gas companies has been held illegal;[1] and the same has been held of a combination of manufacturers of matches.[2]

§ 453. **Effect of declaring Trusts Illegal.** — The effect of declaring a trust illegal is not, of course, to forfeit the property held by the trustees. These continue to hold the property in trust; but instead of holding it according to the trusts of the agreement, they hold it on a constructive trust, created by operation of law for the beneficial owners.[3]

§ 454. **Statutes forbidding Trusts and Combinations.** — Owing to the rapid rise into prominence of trusts, a feeling (perhaps not well founded) has come to prevail that they are dangerous to the public welfare. In consequence of this feeling, a large number of States have passed acts forbidding the formation of trusts or other similar combinations. A type of these acts, and an example of their sweeping character is this:

"If any corporation, partnership, association, or individual shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, understanding, or confederation with any other corporation, partnership, or individual to regulate or fix the price of [specified commodities or all commodities] or shall create, enter into, become a member of or a party to any pool, arrangement, combination, or confederation to fix or limit the amount or quantity of any commodity or article to be manufactured, mined, produced, or sold in this State, he or it shall be deemed guilty of a conspiracy to defraud, and be subject to penalties."[4]

because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city. In West Virginia Transportation Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 617, it was said: 'If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest.'" Magruder, J., in Chicago Gas Light & Coke Co. *v.* People's Gas Light & Coke Co. 121 Ill. 530, 13 N. E. 169.

[1] Gibbs *v.* Baltimore Gas Co., 130 U. S. 396; Chicago Gas Light & Coke Co. *v.* People's Gas Light & Coke Co., 121 Ill. 530, 13 N. E. 169; People *v.* Chicago Gas Trust, 130 Ill. 268, 22 N. E. 798.

[2] Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102.

[3] Cameron *v.* Havemeyer, 25 Abb. N. C. 438.

[4] This or similar statutes have been passed in the following states: Ala. Acts 1891, c. 202, § 1; Cal. Stat. 1893, c. 19, § 4 (as to live stock); Ill. Laws 1891, p. 206;

And by Act of July 2, 1890, the Congress of the United States passed a similar Act, providing that "every contract or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations," shall be illegal; and that "every person who shall monopolize, or combine or conspire with another person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be guilty of a misdemeanor." These specific statutes were preceded by a more general form of enactment, like the New York Act, which declared that "If two or more parties shall conspire to do any act injurious to trade or commerce, they shall be deemed guilty of a misdemeanor." [1]

§ 455. **Effect and Interpretation of such Statutes.** — These statutes considerably extend the common law. Where at common law all trusts are legal unless they are formed for certain illegal purposes, or in an illegal manner, under the statutes most forms of combination are illegal.[2] The Act of Congress of July 2, 1890, has however been held not to apply to combinations between railroads, since the regulation of railroads was accomplished by the Interstate Commerce Act.[3]

Iowa Laws 1890, c. 28; Kas. Laws 1889, c. 257; Ky. Acts 1890, c. 1621; La. Acts 1890, c. 86; Maine Laws 1889, c. 266, § 1; Mich. Acts 1889, c. 225; Minn. Laws 1891, c. 10; Miss. Laws 1890, c. 36, § 1; Mo. Laws 1891, p. 186; Neb. Laws 1889, c. 69; Laws 1891, c. 46, § 5 (school books); N. Mex. Laws 1891, c. 10, § 1; N. Car. Laws 1889, c. 374; N. Dak. Const. Art. 7, § 146; Acts 1890, c. 174, § 1; S. Dak. Acts 1890, c. 154, § 1; Tenn. Acts 1889, c. 250; Acts 1891, c. 218.

1 2 R. S. 691, § 8. For a statute aimed directly at combinations in a single line of business, the production of salt, see Laws of 1841, c. 183, § 16; Clancey *v.* Onondaga Fine Salt Mfg. Co., 62 Barb. 395.

2 See American Biscuit & Mfg. Co. *v.* Klotz, 44 F. R. 721; U. S. *v.* Jellico Mt. Coal & Coke Co., 46 F. R. 432.

3 U. S. *v.* Trans-Missouri Freight Association, 53 F. R. 440.

APPENDIX OF FORMS.[1]

Introductory Clauses.

Articles of Copartnership made and entered into this first day of July, A. D. 1893, by and between John Doe of Boston in the county of Suffolk and Commonwealth of Massachusetts, and Richard Roe, of the city of New York, in the county and State of New York.

1. The name and style of the firm shall be John Doe & Co.

2. The business of the firm shall be the brass-finishing business [heretofore carried on by the said Doe at number 1001 Atlantic Avenue in said city of Boston].

3. Said business shall be carried on at number 1001 Atlantic Avenue in said Boston, or at such other place or places as said parties shall mutually agree upon.

4. This copartnership, unless sooner terminated as hereinafter provided, shall continue in force for twenty years from the said first day of July, A. D. 1893.

[*A Simple Form of Introduction is the following.*]

The undersigned, John Doe of, &c., and Richard Roe of, &c., having formed a copartnership under the name and style of John Doe & Co., for the purpose of manufacturing and selling clothing in the city of New York, to continue for the term of three years from the first day of July, A. D. 1893, it is understood and agreed between them as follows, viz. —

Capital.

The capital shall consist of the sum of twenty thousand dollars, to be contributed by the partners in cash, in equal sums of ten thousand dollars each, on or before the first day of August, A. D. 1893. Said partners shall be interested in the business and capital of the partnership in equal shares.

[1] The following forms may be found useful as suggestions in the drawing of Articles of Copartnership. These forms are not original with the editor, but have been made up from reported cases, accredited treatises, and unpublished Articles. Other clauses may be found in the Appendix to Bates on Partnership, from which one or two of these forms have been taken. Many clauses of an elaborate agreement are given in Steuart *v.* Gladstone, 10 Ch. D. 628.

[*On Continuance of old Business.*]

The property, stock in trade, assets and accounts now comprised in the business heretofore carried on by the said Doe shall become the property of this copartnership; and each partner shall own a half interest in the copartnership. The debts due from said Doe in respect of said business, and which are set forth in a schedule annexed to this instrument, amounting in all to five thousand dollars, shall be assumed and paid by this copartnership; but all other debts of said Doe not comprised in said schedule shall not be taken as liabilities of this copartnership, but shall be paid by said Doe.

[*On Taking Former Assets at a Valuation.*]

The lease, plant, fixtures, merchandise, credits, patents, good-will, and all the other effects of said Doe, heretofore employed and used by him in connection with the brass-finishing business at said premises, number 1001 Atlantic Avenue in said Boston, shall be brought into said copartnership, and be taken by it at an agreed valuation of ten thousand dollars, which sum shall be considered as the amount of capital brought by said Doe into said copartnership.

Withdrawal of Capital by Partners Compensation, &c.

The capital is to be employed in the business of the concern, and no part thereof is to be drawn out by any of the partners for the time being except as hereinafter provided.

If any of said partners at any time draw any moneys out of said copartnership except as hereinafter provided, the partner so overdrawing shall be charged interest on the amount at the rate of six per cent. per annum.

Said partners shall be at liberty to draw out of the funds of the firm each month, for their private expenses, the following sums, to wit: John Doe one hundred dollars, Richard Roe fifty dollars. The sums so drawn shall be charged against the partners respectively; and if at the annual settlement hereinafter provided for the profits of any partner do not amount to the sums so drawn out in that year, he shall be charged interest on the deficiency at the rate of six per cent. per annum from that time until such excess shall be repaid to said firm [or, he shall at once repay such deficiency to the firm]. If at such settlement the profits of any partner exceed the amount so drawn out in that year, the excess shall be placed to the credit of said partner on the books of the firm [and he shall be at liberty immediately to withdraw it].

Neither partner shall withdraw from the business of the concern any money until the expiration of six months from this date, and then no more than his share of the profits.

Accounts.

All the transactions of the said copartnership shall be entered in regular books of account, and on the first day of January and the first day of July in each year during the continuance of this copartnership, account of stock shall be taken, and an account of the expenses and profits adjusted and exhibited on said books; said profits shall then be divided, and a moiety carried to the separate account of each partner [or, in the following proportions, viz. to A., 40 per cent.; to B., 30 per cent.; and to C., 30 per cent]. Either partner shall be at liberty to withdraw from the firm at any time the whole or any part of his share of the accrued profits, thus ascertained and carried to his separate account.

Each partner shall have open and free access to the books and accounts of the copartnership at all times, and no material or important changes shall at any time be made in the general business of the firm, either in the buying of stock or in any other respect, by either partner without the knowledge of the other.

Allowance of Interest, Rent, &c.

Each partner is to be allowed interest at the rate of six per cent. per annum upon the amount of capital [accrued profits] standing to his credit from time to time on the books of the firm.

The premises number 1001 Atlantic Avenue in said Boston, belonging to said Doe, shall be used by the copartnership; said Doe shall be credited upon the books of the copartnership with two thousand dollars per annum as rent for the use of said premises, and the copartnership shall pay all taxes, premiums for fire insurance, and repairs on said premises during its occupancy thereof.

Said Doe shall be allowed the salary of one thousand dollars per annum before division of profits, as extra compensation for the management and superintendence of the business; and shall also receive a commission of ten per cent. upon all sales effected by him on behalf of the firm.

Division of Profit and Loss.

The profits of the business, after deducting all expenses [and the sum of one thousand dollars per annum, which shall remain in the firm as additional capital], shall be [equally] divided between the partners [in the following proportion, viz.—] on the first day of January in every year. All expenses and losses of the copartnership shall be borne by the partners in the same proportion.

Duties of Partners.

The partners shall be bound to give only such personal attention to the business as they may find convenient; but neither partner shall engage in any speculation, or in any other business, to the detriment of the said copartnership.

The said partners shall give their entire personal attention to the business, so far as necessary, and shall use their best skill, judgment, and discretion to promote the profits of the concern; and during the continuance of the copartnership neither of said partners shall engage in any speculation on his own separate account, or be in any way interested in any other business than that of the copartnership hereby established.

During the continuance of this copartnership neither of the partners shall assume any pecuniary liability, either in his own name or in that of the firm, for the accommodation of any other person, nor become surety for any other person, without the written consent of the other partner previously obtained.

None of the partners shall draw, accept, indorse, or negotiate any bill of exchange, promissory note, or other negotiable instrument, in the name of any or either of the firms under which the partnership may for the time being be carried on, for his own private use, or for any purpose other than the immediate use of the partnership, or shall suffer the partnership effects, or his share or interest therein, to be attached for any private engagement or debt.

It shall not be in the power of any of the partners to assign all or any part of his share or interest in the capital, stock, or profits of the concern to any person or persons, or to give them a right to inspect the firm books, or to interfere in any way with the business of the firm; and should any such assignation or other conveyance be granted or right given contrary to this stipulation, the same is hereby declared to be null and void and of no force, strength, or effect, so far as regards the copartnership or other individual partners, who shall not be obliged to pay any attention thereto.

Powers of Majority.

In all questions, differences, or disputes, between the partners, arising in said business and the management and regulation thereof, or any act, transaction, matter, or thing, relating thereto, the determination of the majority in number of said partners shall be final and conclusive on the others, unless the others shall be desirous of submitting the determination of the matter in controversy to arbitration, pursuant to the proviso hereinafter contained, and shall require the reference to arbitration within three days after the determination by the majority shall have been communicated to them, and in case of

such arbitration the award shall be final and conclusive upon the parties.

The majority of said partners may at any time forbid the signing of the firm name by either partner, or all dealings with a specified individual upon partnership account. No partner having notice of such decision by a majority of the partners shall act in disobedience to it; and any partner who brings loss upon the partnership by acting in disobedience to the decision of a majority of the partners, shall repay such loss to the partnership.

Dissolution.

Upon the retirement of any partner, or other dissolution of the firm, it shall be lawful for any partner to sign the names of the firm and of the individual partners to all necessary notices of dissolution, in order to the publication of the same.

Upon dissolution of this copartnership by any cause, no living partner shall refuse to sign a written notice of dissolution; and each partner hereby authorizes the other partners to sign in his name any notice of dissolution necessary for publication.

On the termination and final settlement of this copartnership, each partner, respectively, shall take a share of the cash and clothing then on hand, in proportion to his interest in the same, in discharge of his claim upon said copartnership.

In case of the decease of either member of said firm during the term of this copartnership, it shall be the duty of the survivor or survivors, and they are hereby fully authorized, forthwith to take an inventory of the copartnership property, both personal and real, and with the least possible interruption continue the business until the legal and duly authorized representative of said deceased member or members shall appear and assume his or their direction in the disposition of said copartnership property in accordance with the foregoing provisions.

In the event of the death of either party to this agreement, the copartnership shall not on that account be dissolved; but the interest of such deceased partner shall be continued and represented by the legal personal representative of such deceased partner.

If a majority of the partners for the time being in the partnership, shall at any time be desirous that any of the partners shall retire from the partnership, and shall, six calendar months at the least, previously to the time at which they shall be desirous that such partner shall retire, give a notice in writing of such their desire to such partner; then and in such case the partnership shall, as regards the partner to whom such notice shall be given, be dissolved at and from the time in such notice mentioned.

On the dissolution of this copartnership, if the said parties or their legal representatives cannot agree in the division of the stock then on hand, the whole copartnership effects, including the good-will, and excepting the debts due the firm, shall be sold at public auction, at which both parties shall be at liberty to bid and purchase like other individuals, and the proceeds shall be divided after paying the debts of the firm.

On the insanity or insolvency of either partner, his interest in the copartnership shall cease; but the business may be continued by the other partner. The retiring partner's share of the assets of the business, as determined by the last semi-annual stock-taking (or by the next stock-taking, if it is to occur within two months) shall in such case be paid over to his legal representative in three equal semi-annual instalments, the first instalment to be paid within seven days after the next regular stock-taking has been completed. In case of a wilful infraction of the foregoing agreements, or either of them, by one partner, the other partner may, at his option, declare the copartnership terminated, and proceed as if the partner in fault had become insolvent; except that the retiring partner's share of the assets shall in such case be paid to him personally.

This copartnership shall terminate upon either partner giving to the other three months' notice in writing of his desire to terminate the same. By agreement of the partners, one of them may in such case continue the business on such terms as form part of said agreement. If no such agreement is made, all the partnership assets, including the firm-name and good-will, shall be sold at a public auction, at which each partner shall be at liberty to bid and purchase, like other individuals. The proceeds of this sale, and all other assets of the partnership remaining after all debts have been paid, shall then be equally divided between the partners.

In case of the death of the said Doe during the continuance of this copartnership, the business may be closed up by the said Roe, and the said Doe's share of the assets shall be paid over to his executor or administrator, or the said Roe may, at his option, continue the business. If the business is continued, the said Doe's share of the assets, as determined by the last semi-annual stock-taking, shall be held by the said Roe as a loan until the time hereinbefore set for the termination of the copartnership; and one-half of the profits of the business shall be paid over to the said Doe's heirs or representatives at each semi-annual stock-taking, in lieu of interest upon the aforesaid loan. At the expiration of said time, the said Roe shall pay to the heirs or representatives of the said Doe, as payment in full of the aforesaid loan, one-half of the assets of the business (exclusive of accrued profits) which remain after all debts have been paid. The heirs or representatives of the said Doe shall have all such rights in the business as are secured to the said Doe by the

articles above written; but they shall have no right to interfere in the management of the business.

In case of the death of said Roe during the continuance of this copartnership, the copartnership shall not be terminated; but all the interest of said Roe in the copartnership shall pass to his son James Roe. The business shall thereafter be continued, for the benefit of the copartnership, by said John Doe, in accordance with these articles of copartnership; except that no notice given by James Roe shall be sufficient to terminate the copartnership, without the consent of said John Doe.

If any of the partners for the time being in the partnership shall die or cease to be a partner under any of the aforesaid provisions, there shall be placed to the credit of the account of such partner, in lieu of his share of all profits accruing since the 1st of May next preceding his death or ceasing to be a partner as aforesaid, and as cash, twelve months from the 1st of May next after his death or ceasing to be a partner as aforesaid, a sum of money equal to a proportionate part of his share of one year's profit, calculated upon the average profits of the three preceding years of the partnership, and such proportionate part shall be calculated upon or in respect of the number of days which shall have elapsed at the time of his death or ceasing to be a partner as aforesaid since the 1st of May then last.

If any of the partners for the time being in the partnership shall die or cease to be a partner in the concern by any means whatsoever, the concern shall not be thereby or thereupon wholly dissolved, except so far as regards the party so dying or ceasing to be a partner as aforesaid, but the account between such partner or his representatives and the house shall be adjusted as follows: The surviving or continuing partners shall pay to the representatives of such deceased partner, or to the party who shall so cease to be a partner as aforesaid, the sum which shall appear at the credit of the party so dying or ceasing to be a partner as aforesaid, after the same shall have been adjusted under the provisions hereinbefore contained, by three equal instalments, one at the end of the first year, one at the end of the second year, and one at the end of the third year after such partner shall have died or ceased to be a partner as aforesaid, such sum bearing interest at the rate of five per cent. per annum, and in case, on taking the accounts hereinbefore directed, the balance shall appear to be against the partner so dying or ceasing to be a partner as aforesaid, the balance shall be forthwith paid by the personal representatives of such deceased partner or by the party so ceasing to be a partner as aforesaid (as the case may be) to the surviving or continuing partners.

Arbitration.

In case any dispute arises between the partners, either with regard to these articles or with regard to any other partnership transaction, it shall be settled by arbitration; each partner to appoint one arbitrator, and those arbitrators, if necessary, to choose a third.

Conclusion.

In witness whereof the said parties have hereunto set their hands and seals this [day and year first above written] first day of July, A. D. 1893.

Admission of New Member: Extension of Term: Dissolution by Consent. [To be indorsed on the articles.]

In consideration of the premium of ten thousand dollars to be paid to the firm of John Doe & Co. by John Smith of the city of Philadelphia, said Smith is admitted as a full and equal partner in said firm; the within Articles of Copartnership of said firm remaining in force in the new firm, except that the firm name shall be Doe & Roe; the term of the partnership shall be ten years from the date hereof, and the capital shall be fifty thousand dollars, and the partners shall be interested therein in the following proportions, viz.: John Doe, two-fifths; Richard Roe, two-fifths; John Smith, one-fifth.

Said premium shall be paid as follows: Six thousand dollars in cash upon the execution of this agreement, and the remaining four thousand dollars in three months from this date. Said premium shall become the property of the firm of Doe & Roe [or, of John Doe & Co.], and shall be taken to be capital of said Smith; and the firm of Doe & Roe shall pay interest thereon, the same as to the other partners.

It is agreed that the partnership within mentioned shall be continued on the same conditions, limitations, and restrictions for the further term of five years from and after the first day of January, A. D. 1890.

By mutual consent of the within named parties the within partnership is hereby dissolved, and either one of the partners is authorized to receive money and compound the claims due the partnership, and give full receipts and acquittances for the same.

INDEX.

INDEX.

A.

B.

D.

L.

M.

N.

O.

P.

SECTION

SECTION

Q.

R.

S.

T.